No. 86 1729

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

STATE OF CALIFORNIA, ex rel. STATE LANDS COMMISSION,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the equal footing doctrine the State of California became the owner of the bed and waters of Mono Lake upon its admission to the Union in 1850. As a result of the diversion of the lake's feeder streams by the City of Los Angeles, nearly 12,000 acres of Mono Lake's bed have been uncovered. One of the owners of the upland adjoining the uncovered bed is the federal government. It claims that a separate federal rule must be used to determine ownership of the uncovered bed as between it and the State.

1. Whether special federal property rules, separate from the rules applied to other upland owners, must always be used to resolve title disputes between the States and the federal government concerning lands beneath inland navigable waters, despite the holding in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), in which state law was borrowed as the rule of decision.

2. Whether, assuming that a separate federal rule had to be used, the Ninth Circuit erred in concluding that there was an established federal common law rule of reliction, that this rule must govern the ownership of lake bed that has been uncovered by intentional diversions or drainage, and that the uncovering of Mono Lake was "gradual and imperceptible" within the meaning of this rule.

PARTIES BELOW

1. The State of California, acting by and through the State Lands Commission, an agency of the State of California, is the petitioner.

2. The respondents are the United States of America, various federal officials (the Secretary of the Interior, the Secretary of Agriculture, the Director of the Bureau of Land Management, the Chief of the United States Forest Service, the California State Director for the Bureau of Land Management, and the Regional Forester, California, United States Forest Service), and the intervenors, the Sierra Club and the Natural Resources Defense Council.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, State of California, ex rel. State Lands Commission, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 805 F.2d 857 and is reprinted in Appendix (App.) A. The pertinent decisions of the district court, all unreported, are reprinted at Appendices B, C, and D.

JURISDICTION

The district court found that it had jurisdiction under 28 U.S.C. section 1346(f). The judgment of the Court of Appeals was

entered on December 2, 1986 and a timely petition for rehearing and suggestion for rehearing en banc was denied on January 30, 1987. See Appendix E. The jurisdiction of the Court is invoked under 28 U.S.C. section 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The Submerged Lands Act, 43 U.S.C. §§ 1301-1315, is reprinted in Appendix F.

STATEMENT OF THE CASE

This is a quiet title action to determine the ownership of those portions of the uncovered bed of Mono Lake that are adjacent to upland property owned by the United States.

A. Factual Background

Mono Lake is a navigable lake lying immediately east of the Sierra Nevada in eastern California, occupying the lowest portion of the Mono Basin. Court Exhibit (Ct. Ex.) 2-A at 3. Upon its admission to the Union in 1850, California under the equal footing doctrine became the owner of the bed and waters of navigable Mono Lake below its ordinary high water mark. E. g., *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). Similar to many other lakes in the western United States, Mono Lake is a "terminal" lake; such a lake has no outlet and loses water only by evaporation. Ct. Ex. 2-A. The United States owns about 60%-70% of the upland surrounding the lake bed. Def. Ex. T. Intermingled among the parcels of federally-owned upland are upland parcels owned by the City of Los Angeles, the State of California, and private parties. *Id.*

During the late 1920's, the City of Los Angeles developed plans to divert water from the Mono Basin to augment its water supply system. It was no secret that the proposed diversions of the Lake's primary tributaries would result in the uncovering of Mono Lake. This was apparent to Congress when it withdrew approximately

370,000 acres of land in the area surrounding Mono Lake from entry and disposal under the public land laws for the primary purpose of protecting Los Angeles from claims by persons who might settle on federal lands and object to the diversions. Act of March 4, 1931, 46 Stat. 1530; see, e.g., Clerk's Record (CR) 91 at 11-17. During the debate on the Act of March 4, 1931, Congress repeatedly was made aware that Mono Lake would substantially recede or dry up as a result of the proposed diversions. Hearings Before the Senate Committee on Public Lands and Surveys, 74th Cong., 1st Sess. at 34, 37, 43, and 45 (1931). The Act's legislative history contains no mention of the reliction doctrine nor any suggestion that the United States would own the future exposed bed of Mono Lake.

Two years later, in 1933, the United States Department of the Interior did directly address the question of the future ownership of the land that would be uncovered by the impending diversions. In response to an inquiry by the City of Los Angeles, the Department stated that state law governed the extent of the riparian rights of the shore owners, and that, under California law, "if the lands now under the waters of Mono Lake become permanently exposed, ownership thereto will be vested in the State of California." CR 91 at 18-19. California acknowledged in writing the Department's opinion. *Id.* at 19-20. There is no evidence that the United States repudiated its acceptance of state law as Mono Lake receded over the next 40 years.[1]

The Interior Department's opinion that California would retain the bed of Mono Lake as it became uncovered was based on the Department's published 1917 opinion regarding the uncovered bed of nearby Owens Lake. 23 Pub. Lands Dec. 68 (1917); CR 91 at 5-6. In this opinion, the Department stated that the upland ownership rights of all riparian owners were controlled by the law of the individual state. *Id.* Referring to California law that reserves title to lake bed which has been uncovered by drainage in the owner of the bed (the same state law relied upon by

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[1] The United States did not assert a claim to the uncovered bed of Mono Lake until the 1970's, although California asserted its ownership in the interim. E.g., CR 91 at 24, 26.

California here), the Department concluded that the lands of Owens Lake that had been uncovered by diversions since the date of California's admission into the Union "are not in any sense public lands of the United States . . . " CR 91 at 5-6.

Against this backdrop, California in 1940 issued a permit to the City of Los Angeles under which the City commenced diversions of the four major streams that are tributary to Mono Lake. Ct. Ex. 2-A at 51-55. At the time that diversions commenced in November 1940, the lake stood at an elevation of approximately 6417 feet above mean sea level and covered 55,000 acres. Ct. Ex. 2-C at F-661. These diversions have since led to the substantial recession of the lake. At the time of trial in 1985, the lake stood at approximately 6380 feet and covered about 43,275 acres, nearly 12,000 acres having been exposed since 1940. *Id.* at F-672. But for diversions, the level of Mono Lake today would stand only slightly below 6430 feet and, therefore, greatly above the 1940 level of 6417 feet. Ct. Ex. 2-A at 60-61, 82-83. The lake's decline is therefore wholly attributable to diversions from the Mono Basin. Public awareness of this dramatic decline has spawned a series of environmental actions designed to protect Mono Lake. E.g., *National Audubon Society, v. Superior Court,* 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709, *cert. denied,* 464 U.S. 977 (1983).

If California prevails in this litigation, the entire uncovered bed of Mono Lake would belong to California and would be managed as part of the Mono Lake Tufa State Reserve, Cal. Pub. Resources Code §§ 5045-49. If the United States prevails, the uncovered bed would be a "checkerboard" of federal and state-owned lands. The federal portion of the uncovered bed would be separately managed as part of the Mono Basin National Forest Scenic Area, Title III of P.L. 98-425, 98 Stat. 1619, with the remainder of the uncovered bed continuing to be owned and managed by California under state law.

B. Proceedings Below

Upon cross-motions for summary judgment, the district court determined that federal law applied and, further, that federal law required use of federal common law, not state law, as the rule of

decision. App. B. The district court's choice of law was based on *California ex rel. State Lands Commission v. United States,* 457 U.S. 273 (1982) (hereafter *California v. United States*), in which this Court held that federal common law controlled the ownership of coastal accretions because coastal accretions had been retained in section 5(a) of the Submerged Lands Act of 1953, 43 U.S.C. § 1313(a). The district court found that section 5(a) also required the use of federal common law in this case because section 5(a) did not distinguish between coastal and inland waters. App. B at A-22. The district court attempted to distinguish *Wilson v. Omaha Indian Tribe,* 442 U.S. 653 (1979), a dispute along inland waters in which the Court borrowed state law, as a case involving "intermediate" issues of title, whereas, according to the district court, this case and *California v. United States* involved "determinative" questions of title. App. B. at A-27.

The district court then assumed that a "reliction" doctrine controlled the ownership question under federal common law, but was unable to find that the recession constituted a reliction on the factual record before it. *Id.* at A-30-32. It therefore set the case for trial to determine whether, under federal common law, a reliction had occurred.

At trial, the parties disputed the existence, content, and application of federal common law, and to support their respective positions, they presented detailed information about the physical condition of the Lake and its environment, the history of Los Angeles' diversions and the effect of diversions upon the level of the Lake, and the rate of shoreline movement at various "profiles" around the Lake. At the close of trial, the district court found that the uncovering constituted a "gradual and imperceptible" reliction under its view of federal common law. App. C at A-44. In ruling for the federal government, the district court nevertheless characterized this as the kind of case where the trial judge "knows beyond reasonable doubt and to a moral certainty that he is a mere way stop on the way to the Supreme Court." RT at 979.

On appeal, the Ninth Circuit affirmed. The Ninth Circuit accepted the district court's view and found that federal law required use of federal common law rules under its reading of *California v. United States* because section 5(a) of the Sub-

merged Lands Act applied to both coastal and inland waters. App. A at A-6. The Ninth Circuit's attempt to distinguish *Wilson*, however, proceeded on an entirely different basis.[2] Apparently overlooking the fact that Iowa's claims were based on the equal footing doctrine, *Wilson*, 442 U.S. at 657 n. 2, the Ninth Circuit stated that *Wilson* only involved a dispute between the United States as a riparian upland owner and the State of Iowa acting as an upland owner. App. A at A-6-8. From this premise, the Ninth Circuit announced the following distinction: where a State's claim against the federal government is based on the State's riparian upland ownership, state law should be borrowed under the rule in *Wilson*; where, as here, a State's claim against the federal government is based on the State's ownership of sovereign lands, the Submerged Lands Act "mandates" that federal common law supply the rule of decision. *Id.* The Ninth Circuit further stated that even were it to apply the *Wilson* balancing test, the *Wilson* test would require adoption of federal common law because it was possible that a State "*could* adopt property rules that would always award disputed land to the submerged land owner and thus that would always be injurious to the interests of the United States." *Id.* at A-8, 10 (emphasis added). The Ninth Circuit reached this conclusion without discussing California law, without addressing whether California law was actually hostile to federal interests, and without undertaking the three-part balancing test prescribed by *Wilson*.

Next, applying what it termed a "well-settled" federal common law of reliction to the facts at hand, the Ninth Circuit upheld the district court's conclusion that the uncovering of Mono Lake was gradual and imperceptible. In doing so, the Ninth Circuit rejected California's arguments about the appropriate content of federal common law, assuming that state law was not to be applied. First, it rejected California's contention that the common law employs a "drainage" rule, and not the reliction doctrine, where lakes are uncovered by intentional diversion or drainage. *Id.* at A-9. Second, it rejected California's alternative argument that if a reliction

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[2] On appeal, neither the United States nor the intervenors defended the district court's attempt to distinguish *Wilson* on the basis of "intermediate" and "determinative" questions.

doctrine applies, the district court misapplied the test for determining whether changes were gradual and imperceptible because the district court's test was based solely on whether a person was capable of seeing shoreline movement at an instant of its occurrence.[3]

The Ninth Circuit thereafter rejected California's petition for rehearing and suggestion for rehearing en banc in which, inter alia, California argued that the panel's decision conflicted with three other cases in which the Ninth Circuit borrowed state law as the rule of decision to resolve boundary disputes involving federal property along inland navigable waters.[4]

REASONS FOR GRANTING THE PETITION

This Court has long recognized the importance of the choice of law question presented by these recurring boundary disputes along the shores of navigable waters. See *California v. United States,* 457 U.S. 273; *Wilson v. Omaha Indian Tribe,* 442 U.S. 653; *Oregon ex. rel. State Lands Board v. Corvallis Sand and Gravel Co.,* 429 U.S. 363 (1977) (hereafter "*Corvallis*"), overruling *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973). The primary issue presented by this petition is whether, as the Ninth Circuit held, the Submerged Lands Act automatically and unconditionally requires the use of separate federal rules to resolve boundary

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[3] The Ninth Circuit attempted to avoid this issue by indicating that the two "average" rates of shoreline migration contained in the district court's findings supported the district court's conclusion even under California's version of the test because these two average rates were in no way comparable to the avulsion of a river. App. A at A-12. By testing these averages against the concept of an avulsion, however, the Ninth Circuit implicitly adopted the district court's test that a recession is gradual and imperceptible unless the recession is an avulsive movement visible at an instant of its occurrence.

[4] See *Puyallup Tribe of Indians v. Port of Tacoma,* 717 F.2d 1251, 1261 n. 11 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 1324 (1984); *United States v. Aranson,* 696 F.2d 654, 658 (9th Cir.), *cert. denied,* 464 U.S. 982 (1983); *United States v. Harvey,* 661 F.2d 767, 770-71 (9th Cir. 1981), *cert. denied,* 459 U.S. 833 (1982).

disputes along inland navigable waters between the United States and a State claiming on the basis of its ownership of sovereign lands. The Ninth Circuit's holding is not only in irreconcilable conflict with *Wilson,* but represents an unwarranted and unprecedented expansion of federal common law into areas of traditional state concern. This Court's review is essential.

Wilson was also a title dispute between a State and the United States involving the bed of inland navigable waters. Applying a three-part balancing test, this Court held that federal law ordinarily must borrow state law as the rule of decision. Despite *Wilson's* clearly expressed preference for the use of state law, the Ninth Circuit determined here that sections 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a), "mandates" the creation of federal common law rules to resolve boundary disputes between the United States and the States along inland navigable waters whenever the State's claim is based upon its ownership of sovereign land. The Ninth Circuit attempted to reconcile this apparent conflict with *Wilson* by limiting *Wilson's* adoption of state law to those rare federal/state boundary disputes in which a State's claim is based upon riparian ownership.

In reaching this conclusion, the Ninth Circuit chose to disregard the reason why the borrowing of state law in this case is compelled by both *Wilson* and *California v. United States.* A federal common law rule of decision was arguably required in *California v. United States* because that case involved accretions to *coastal* lands that were reserved from the Act's *grant* of submerged coastal lands to the States. *California v. United States,* 457 U.S. at 283, 287. *Wilson* and this case, however, involve State sovereign claims to lands underlying *inland* navigable waters that the States have always owned since the dates of their respective admissions into the Union under the equal footing doctrine. E.g., *Corvallis,* 429 U.S. at 373-74; *Pollard's Lessee v. Hagan,* 44 U.S. at 223. The Act does not provide the basis for the State's ownership of lands underlying inland waters, and therefore cannot provide, and was not intended to provide, a basis for the use of federal common law in disputes regarding them. *Corvallis,* 429 U.S. at 371-2 n.4. In urging this distinction between coastal and inland waters California is in good company: the Solicitor General

advocated the very same distinction to this Court in *California v. United States*. See infra at 14-15.

In contrast, the Ninth Circuit's attempt to distinguish *Wilson* is contrived and unsupportable. The Ninth Circuit's analysis of *Wilson* was wholly dependent on its assumption that Iowa's claims were based solely on its riparian ownership. App. A at A-6-8. *Wilson*, however, unmistakably involved sovereign, equal-footing claims by Iowa. *Wilson*, 442 U.S. at 657 n. 2. The Court in *Wilson* did not even mention the Submerged Lands Act, much less find that it "mandated" federal common law rules. Moreover, there is not a word in *Wilson* to suggest that its choice of law analysis depended on whether a State's claims were based on riparian, as opposed to sovereign, ownership.

Although the need to eliminate this conflict with its past decisions is reason enough for the Court to accept this case, the long term danger of the Ninth Circuit's opinion may reside in its unrestrained and uncritical embrace of federal common law in an area where the Court has urged a considered balancing of interests tempered with a respect for the States' interest in administering their own law, especially property law. Apparently determined to forge a federal common law rule that would "protect" federal interests, the Ninth Circuit radically departed from this Court's approach. Thus, rather than perform the balancing required by *Wilson*, the Ninth Circuit adopted an unconditional rule requiring the use of federal common law. And, disregarding *Wilson's* requirement that there be "concrete evidence" that state law would adversely effect federal interests, *Wilson*, 442 U.S. at 673, the Ninth Circuit refused to discuss the content of state law, refused to identify specific federal interests, refused to consider whether state law was in fact hostile to federal interests, and refused to address California's showing that federal interests would not be harmed by a state rule of decision. Instead, the Ninth Circuit adopted a conclusive presumption against the use of state law merely because it was possible that state law "could" injure federal interests.

As a result, the Ninth Circuit has now created a dual system of property law. In disregard of *Wilson's* policy that there is "little reason why federal interests should not be treated under the same

rules of property that apply to private persons holding property in the same area by virtue of state, not federal, law," *Wilson*, 442 U.S. at 672, separate federal rules must now govern title disputes involving inland navigable waters between the federal govenment and the States, even in the absence of evidence that the state law that will apply to all other disputes is hostile to federal interests. What this means—as evidenced in Part II of this petition—is that, regardless of the Court's admonition in *Wilson* that it found "no imperative need" to create uniform property rules, *Wilson*, 442 U.S. at 673, federal courts will now be required to develop uniform principles of federal real property law that will somehow be capable of application on a nationwide basis, despite the variety of physical and political conditions that exist in different regions of this country.

The irony in all this is that the Ninth Circuit found the justification for its revolutionary approach to principles of federalism in the Submerged Lands Act. With respect to lands underlying inland waters, the Act was merely an emphatic confirmation of the States' preexisting and undisputed ownership of these lands under the equal footing doctrine. E.g., *Corvallis*, 429 U.S. at 371-72 n.4. The manner in which the Ninth Circuit has twisted the Act's unequivocal support of the States into a tool for subjecting their sovereign interests to a regime of federal common law vividly demonstrates the extreme and urgent need for this Court's intervention.

California respectfully requests that the Court grant its petition for a writ of certiorari.

I

THE NINTH CIRCUIT'S OPINION CONFLICTS WITH THE HOLDING IN *WILSON* THAT FEDERAL LAW SHOULD ORDINARILY BORROW STATE LAW AS THE RULE OF DECISION TO RESOLVE DISPUTES INVOLVING FEDERAL PROPERTY ALONG INLAND NAVIGABLE WATERS.

A. *Wilson* and *California v. United States*—an Overview

Wilson v. Omaha Indian Tribe involved, in part, a title dispute between the State of Iowa, as owner of the river bed, and the Omaha Indian Tribe, as owner of the uplands, over land created by a shift in the Missouri River. The issue was whether the changes in the river were "accretive" or "avulsive." Because the United States had never yielded title or terminated its interest in the upland property that it held in trust for the Indians, the Court held that the Indians' right to the property depended on federal law. *Wilson,* 442 U.S. at 670-71. Even though federal law was controlling, however, this did not necessarily mean that a federal common law rule must decide the outcome:

> " '[c]ontroversies . . . governed by federal law, do not inevitably require resort to uniform federal rules . . . Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law' ". *Id.* at 671-72, quoting *United States v. Kimbell Foods, Inc.* 440 U.S. 715, 727-728 (1979), quoting *United States v. Standard Oil Co.*, 332 U.S. 301 (1947).

This choice of law question required consideration of whether there is need for a nationally uniform body of law to apply in situations comparable to this, whether application of state law would frustrate federal policy or functions, and whether a federal rule would have an impact on existing relationships under state law. *Id.* at 672-673. Applying this three-part test, the *Wilson* court held that state law, and not federal common law, should supply the rule of decision to determine ownership of the newly-created land.

> "We perceive no need for a uniform national rule to determine whether changes in the course of a river affecting riparian land owned or possessed by the United States or by an Indian tribe have been avulsive or accretive. For this purpose, we see little reason why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of state, rather than federal law. It is true that States may differ among themselves with respect to the rules that will identify and distinguish between avulsions and accretions but as long as the applicable standard is applied evenhandedly to particular disputes, we discern no imperative need to develop a general body of federal common law to decide cases such as this, where an interstate boundary is not in dispute. We should not accept 'generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests].'" *Wilson*, 442 U.S. at 673, quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 730.

California v. United States, 457 U.S. 273, involved ownership of accretion along the ocean boundary of a United States Coast Guard reservation. The Court first held that federal law applied because, as in *Hughes v. Washington*, 389 U.S. 290 (1967), the dominant federal interest in international relations required application of federal law to govern oceanfront shoreline changes. *Id.* at 282. The Court also found that, as in *Wilson*, this was a case in which the United States had never parted with title or terminated its interest.

The Court then considered whether federal law should adopt state law or federal common law as the rule of decision. The Court chose federal common law, finding that Congress in section 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a), had addressed ownership of the lands in dispute because it withheld "from the grant to the States all 'accretions' to coastal lands acquired or reserved by the United States." *Id.* at 283. This federal statutory directive "foreclosed" application of state law. The Court also stated that this was "not a case in which federal common law must be *created*," because it was settled under

federal law that the upland owner had a right to future accretions. *Id.* at 284 (emphasis in original). The Court distinguished *Wilson* as a case where there was no statutory directive and no special federal concerns. *Id.*

California has assumed for purposes of argument that, under *Wilson,* federal law should be applied in the first instance because the United States has not terminated its interest in the uplands surrounding Mono Lake. That does not answer the question whether federal law should adopt a federal or a state rule of decision. *Wilson* and *California v. United States,* read together, provide two dispositive reasons why state law must be borrowed here.

B. Section 5(a) of the Submerged Lands Act Does Not Require Use of Federal Common Law Rules in Boundary Disputes Involving Inland Navigable Waters That the States Own Under the Equal Footing Doctrine

First, the Submerged Lands Act is not implicated in actions such as this and *Wilson,* which involve state claims to *inland* navigable waters.

It is undisputed that, under the equal footing doctrine, title to lands beneath inland navigable waters and tidewaters passed to the new States upon their admission to the Union. E.g., *Pollard's Lessee,* 44 U.S. at 229; *Weber v. Board of Harbor Commissioners,* 85 U.S. (18 Wall.) 57, 65-66 (1873). For many years, it was generally thought that the States also owned the submerged coastal lands within the three-mile limit. After the Court decided in *California v. United States,* 332 U.S. 19 (1947), that the federal government had "paramount rights" to these submerged coastal lands, Congress enacted the Submerged Lands Act in order to establish with certainty the States' ownership of these coastal lands. E.g., H.Rep. No. 1778, 80th Cong., 1st Sess (1948), reprinted in 1953 U.S. Code Cong. & Ad.News 1417; 99 Cong. Rec. 2526, 2564, 2584, 2830 (1953). At the same time that it "granted" these submerged coastal lands to the States, the Act gratuitously confirmed undisputed state ownership of lands underneath inland navigable waters. E.g., *Corvallis,* 429 U.S. at 371-72, n.4; *Bonelli Cattle Co.,* 414 U.S. at 324 n.6.

With this background in mind, it is perfectly understandable why the Submerged Lands Act does not direct the creation of federal rules of decision in cases such as this and *Wilson*, which involve disputes along inland navigable waters. Because the States' claims to lands underlying inland waters are derived from the equal footing doctrine, not the Submerged Lands Act, the Act does not come into play in disputes involving inland waters. The fact that federal property adjoining inland waters may fit within the literal scope of section 5(a) cannot provide a basis for the creation of federal common law, because the Act, as merely a confirmation of existing law regarding inland waters, was clearly not intended to alter existing rights to such lands and could not generate the need for federal rules where state law otherwise would control. The Ninth Circuit's contrary conclusion imputes to Congress an intent to enhance federal claims to lands adjoining inland waters at the expense of the States, a result in utter contradiction of Congress's obvious intent to foster state ownership and control of these lands by confirming the State's undisputed title. E.g., 43 U.S.C. § 1311. All of this explains why the Submerged Lands Act was never mentioned in *Wilson*.

Indeed, the very argument made by California here was advanced by the Solicitor General of the United States in California v. United States:

> "With respect to lands underlying *inland* navigable waters, state title may reach beyond the limits defined in the Submerged Lands Act, because that statute cannot restrict a constitutional grant or reservation at statehood. That is, in effect, the holding of *Corvallis*, which recognizes that a state may, by local law rule, retain once submerged lands that the Submerged Lands Act does not embrace. But no similar result is possible along the open sea. In light of the consistent holdings of this Court since the first *California* case that coastal states held no title to the seabed, the *only* basis for a state claim to lands now or previously underlying the open sea is the Submerged Lands Act of 1953. And, as we have seen, that grant does not encompass former water bottoms which, through accretion, have become attached to the upland." *California ex rel. State Lands Commission v.*

United States, No. 89 Original, Brief of the United States at 15. (Emphasis in original.)

California v. United States itself fully supports this analysis. The use of federal common law rules arguably was necessitated in *California v. United States* because that case involved "accretions to *coastal* lands" that had been withheld from the grant to the states in the Submerged Lands Act. 457 U.S. at 283 (emphasis added); the interpretation of a federal grant may raise federal concerns, *id.* at 287; see *Packer v. Bird,* 137 U.S. 661, 669-70 (1891). In arriving at this conclusion, however, the Court gave no indication that it also thought that section 5(a) required creation of federal rules to settle disputes involving inland waters. Instead, repeatedly distinguishing between "granted" coastal lands and "confirmed" lands underlying inland waters, 457 U.S. at 283, 285, 287, the Court expressly found that no "statutory directive" and no federal interests had been implicated in *Wilson. Id.* at 283-84; see also *Corvallis,* 429 U.S. at 363 n. 6.

Therefore, although the Act mentions and confirms title to lands beneath inland waters, the Act provides no basis to require the use of federal common law in disputes in regarding their ownership.

C. Like *Wilson,* This Is a Case Where There Are No Settled Federal Common Law Rules to Characterize Physical Shoreline Changes

Although the preceding analysis is dispositive, there is a second distinction between *California v. United States* and *Wilson* that also strongly weighs against the use of federal common law. In *California v. United States,* both parties agreed that the buildup of land physically constituted an accretion, 457 U.S. at 287, and the only issue wsas who owned the undisputed accretion. In that circumstance, the Court could apply a rule awarding accretion to the upland owner. *Id.* at 284. In *Wilson,* however, where there was disagreement about the characterization of the physical shoreline changes, the Court found "no imperative need" to develop a body of federal law to characterize whether changes caused by the Missouri River were "accretive or avulsive." *Wilson,* 442 U.S. at 673. Taking the cases together, the Court is stating a policy

against the development of a federal common law of real property except in instances where federal common law is already well-established and its use is otherwise indicated. In this regard, the Court is simply carrying forward its general policy disfavoring the creation of federal common law. E.g., *Milwaukee v. Illinois,* 451 U.S. 304 (1981); *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938).[5]

In this case, the parties disputed whether the uncovering of Mono Lake constituted a reliction, just as the parties in *Wilson* disputed whether the changes to the Missouri River constituted an accretion. There is no "settled" federal common law setting forth the standards for determining what constitutes the reliction of a navigable lake. See infra at 20-21. Indeed, the absence of settled federal common law rules is much more apparent in this case than *Wilson.* There is a fair body of federal case law involving changes on navigable rivers because of the frequency of interstate boundary disputes. See, e.g., *Nebraska v. Iowa,* 143 U.S. 359 (1892). In contrast, federal case law involving the characterization of shoreline changes on navigable lakes is virtually non-existent. *Infra* at 20-21.

D. The Ninth Circuit's Opinion Cannot Be Reconciled With Wilson

As previously noted, *supra* at 6, 9, the Ninth Circuit's attempt to distinguish *Wilson* as a case involving state riparian claims (as opposed to state sovereign bed claims), App. A at A-6-8, fails for the simple reason that the State of Iowa in *Wilson* relied on its sovereign title under the equal footing doctrine to support its claim to the lands created by a shift in the river. *Wilson,* 442 U.S. at 657 n. 2.

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[5] Although the absence of existing federal common law is a factor that weighs against its creation, it does not necessarily follow that the existence of an established federal rule requires that federal common law control. See *United States v. Aranson,* 696 F.2d 654 (9th Cir. 1983) (federal law borrows state law to determine ownership of newly-created land, even where there is no dispute that the land is the product of accretion).

Even if *Wilson* and this case were factually distinguishable, the Ninth Circuit's conclusion that the Submerged Lands Act requires a federal common law rule to govern state sovereign claims against the federal government leads to outlandish and conflicting results. Under the Ninth Circuit's analysis, for example, in a boundary dispute involving a State as owner of the river and the United States and a private party as upland owners on opposite banks, the United States' claim against the private party that the river shift was "accretive" would be determined as a matter of state law, while the United States' claim against the State involving the *identical* physical change would be governed by federal common law. The Ninth Circuit offered no reason why Congress would have desired such a result, and every policy reason in *Wilson* dictates against it. See *Wilson*, 442 U.S. at 674.

The Ninth Circuit's alternative holding also conflicts with *Wilson*. Refusing to analyze the three *Wilson* factors, see *supra* at 11, the Ninth Circuit indicated that it would reach the same result even were it to apply the *Wilson* balancing test, because the state, as the owner of the Submerged bed, "could" adopt rules that are injurious to federal upland interests. App. A at A-8.[6]

The Ninth Circuit did not state what California law is, and, therefore, never even suggested that application of California law would be hostile to federal interests.[7] It completely ignored

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[6] The Ninth Circuit's initial assumption is factually mistaken: the parties *will not* always occupy the same relative positions, because the United States may own the beds of navigable waters. In *Puyallup Tribe of Indians*, 717 F.2d 1251, for instance, the federal interest (the Puyallup tribe) owned the bed of the river and the Port of Tacoma owned the upland. The tribe, taking advantage of favorable state law on the definition of avulsion, prevailed in the litigation. In California itself, the United States appears to own the beds of three navigable lakes and could benefit from state law regarding ownership of uncovered lake beds. See Cal. Stats. 1905, ch. VI, p.4 (cession of uncovered lake lands by state); 33 Stat. 714 (1905) (acceptance by United States).

[7] Because the Ninth Circuit failed to address these issues, a full exposition of California law, and why it is not hostile to federal interests, must await a brief on the merits. Briefly stated, under California law, which follows common law decisions, *infra* at 21, the uncovering of lake

California's concrete historical evidence that federal interests would not be harmed by a state rule.[8] Instead, it relied on the theoretical possibility that a State "could" adopt property rules that benefit the owner of the submerged lands. The Ninth Circuit in effect conclusively presumed that the States will adopt rules that discriminate against federal interests. This approach is directly contrary to *Wilson*: "We should not accept 'generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests]." *Wilson*, 442 U.S. at 673, quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979).

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beds by a drainage of their waters does not constitute reliction and continues to belong to the owner of the bed. Cal. Stats. 1893, Chap. 229, p. 341 (Cal. Pub. Res. Code § 7601). The uncovering of Mono Lake is such a drainage. *City of Los Angeles v. Aitken*, 10 Cal.App.2d 460, 52 P.2d 585, 587, 590 (1935). Any claim that application of this California law here would be hostile to federal interests would be futile: (1) it is applied evenhandedly to private and public upland interests, see *Wilson*, 442 U.S. at 673; (2) it is consistent with the practice of the majority of states that do not apply the reliction doctrine to intentionally uncovered or drained lands, *infra* at 21; (3) for more than 50 years, federal officials managed federal lands in California with the understanding that California owned uncovered lake beds under California law without ever suggesting that state law was hostile, *supra* at 3-4; and (4) contrary to the assumption of the Ninth Circuit that the states and the federal government will always occupy the same relative positions, App. A at A-8, the federal government may benefit from the California law of uncovered lake beds. *Supra* at 17 n.6.

Even if the reliction doctrine governed this situtation under California law, the uncovering of Mono Lake would not be gradual and imperceptible. See *People v. William Kent Estate Co.*, 242 Cal.App.2d 156, 551 Cal.Rptr. 215 (1966).

[8] For example, the United States publicly acknowledged in 1933 that under California law California would own the bed as it became exposed. *Supra* at 3. This historic acceptance of California law governing federal upland ownership rights at Mono and Owens Lakes is alone dispositive on the choice of law issue. See *Kimbell Foods, Inc.*, 440 U.S. at 730-33 (federal law incorporates state law as rule of decision where SBA administratively relied on state substantive law).

The necessary effect of the Ninth Circuit's decision will be to require the development of federal common law rules in virtually every case involving state sovereign interests. Not a word in *California v. United States* suggested that the Court intended to essentially overrule its unanimous decision in *Wilson* rendered just four years previously. This Court's review is absolutely necessary to explain to the federal courts that *Wilson* remains the law in boundary disputes involving federal property along inland navigable waters.

II

IF FEDERAL COMMON LAW MUST GOVERN THIS CASE, THE COURT MUST DEVELOP RULES FOR DETERMINING WHETHER A RELICTION HAS IN FACT OCCURRED

Even if federal common law rules of property must now govern, the Court should grant this petition in order to determine the content of federal common law. There are no "settled" federal principles to resolve disputes about the ownership of uncovered lake bed, and general common law supports California's retention of the uncovered bed.

A. Common Law Courts Do Not Ordinarily Apply the Reliction Doctrine to Determine Ownership of Lake Beds Uncovered by Intentional Diversions or Drainage

The parties have had two primary disagreements about what should be the content of federal common law. First, the parties dispute whether the common law reliction doctrine should govern the ownership of the uncovered bed.[9] The United States argued, and the Ninth Circuit found, that there exists a "well-settled" federal common law of reliction, and that this reliction doctrine

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[9] Accretion at common law is generally defined as the gradual and imperceptible addition of soil to the shoreline by the action of the water to which the land is contiguous. E.g., *Mather v. State*, 200 N.W.2d 498, 500 (Iowa 1972). Reliction is the uncovering of land by the gradual and imperceptible recession of water. *Flisrand v. Madison*, 152 N.W. 796, 798 (S.D. 1915).

always governs the ownership of uncovered lake bed regardless of the circumstances in which it became uncovered. California contended that there are no federal common law rules for determining whether the uncovering of a lake bed constitutes a reliction, and that, if federal common law must be created, it should follow the line of general common law authority, which does not apply the reliction doctrine where lake beds are uncovered by an intentional diversion or drainage of their waters, and instead applies a drainage rule in which the submerged bed owner retains the uncovered bed.

The Ninth Circuit's misconception that there exists a well-settled federal common law of reliction was based on its understanding that, under federal law, accretion or reliction belongs to the upland owner. See *California v. United States,* 457 U.S. at 284. Yet this ownership rule does not come into play, if at all, until the threshold question has first been resolved—does the process by which the lake has been uncovered even constitute a reliction? There is no federal common law authority, however, that provides standards or criteria for answering this threshold question.

The "well-settled" federal law addressing uncovered lake bed upon which the Ninth Circuit relied consisted of three cases, all involving accretion to certain subdivided lots on the western shore of Lake Michigan, *Banks v. Ogden,* 69 U.S. 57 (1865); *Johnston v. Jones,* 66 U.S. 209 (1862); *Jones v. Johnston,* 59 U.S. 150 (1856). These cases provided no guidance whatever for determining whether the reliction doctrine should be used to characterize the process that has occurred in the factual circumstances of this very different case. None required the Court to determine the nature of the process involved—all the parties agreed that the newly-added land was the product of accretion. *Jones,* 59 U.S. at 151-53. All the Court was required to decide were the rules for apportioning this identified accretion between competing upland owners. *Id.* at 152-53, 157. Consequently, the Court did not address—and had no reason to address—whether it is appropriate to employ the reliction doctrine where a lake has been uncovered by drainage or diversions. Nor did the Court identify or apply any standards for determining whether shoreline movement was grad-

ual and imperceptible within the meaning of the reliction doctrine. *Id.* at 155 ("I speak not now of sudden and considerable changes, which are governed by different principles"). And, even if the Court had established such rules, it could not be assumed that they would apply in the vastly different factual situation where there has been a substantial recession of a terminal lake resulting from a diversion of its tributaries.

If the Ninth Circuit wished to create federal common law, it should have looked to general common law authority, under which the owner of the bed retains ownership of lake bed that has been uncovered by intentional diversions or drainage. E.g., *Martin v. Busch,* 112 So. 274, 287 (Fla. 1927) ("The doctrine of reliction is applicable where from natural causes water recedes by imperceptible degrees; and does not apply where land is reclaimed by governmental agencies as by drainage operations"); *Padgett v. Central and South Florida Control Dist.,* 178 So.2d 900, 904 (Fla.App. 1965) ("Where, as here, the state causes or permits the level of a navigable lake to be lowered so as to make the water recede and thereby uncover lands below the original high-water mark, lands so uncovered continue to belong to the state"); see *Noyes v. Collins,* 61 N.W. 250 (Iowa 1894); *State v. Longyear Holding Co.,* 29 N.W.2d 657 (Minn. 1947); Tiffany, Law of Real Property (3d ed. 1939, ch. 28, § 1222 at 1083; cf. *Garrett v. State,* 289 A.2d 542 (N.J. 1972) (state retained ownership of dry creek bed exposed as result of upstream filling operations conducted by third party with state consent).) The United States Department of Interior itself has previously recognized this rule that a lake bed which has been intentionally uncovered through drainage or diversions continues to belong to the owner of the lake bed. *Rayford v. Winters,* A 28125 (January 15, 1960). The California law of uncovered lake beds is essentially a codification of this common law drainage rule. (*Supra* at 17 n. 7.)

In short, federal common law courts have never developed any standards or rules to determine whether the intentional uncovering of a lake bed by diversions is governed by the reliction doctrine or the drainage doctrine. The absence of federal common law is not surprising, because, until the Ninth Circuit's decision here, the development of real property rules has been the concern

of state law, at least where interstate boundaries are not involved. *Wilson*, 442 U.S. at 673. Therefore, should the Court determine that federal common law governs this case, it should follow the common law rule that specifically addresses the situation in which lake beds have been uncovered by intentional diversions or drainage, under which California retains the uncovered bed.

B. There Are No Federal Common Law Rules for Determining Whether a Recession Is "Gradual and Imperceptible"

Second, should the Court determine that this case must be governed by a federal common law of reliction and not a drainage doctrine, it should resolve the parties' dispute about the test for determining whether the uncovering of a lake has been "gradual and imperceptible" within the meaning of the reliction doctrine. The United States, relying on dicta in *County of St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 46, 50 (1874), has contended that the uncovering of a lake is gradual and imperceptible unless it can be perceived at an instant of its occurrence, and that only lake shoreline movement as rapid as that associated with a river avulsion can defeat application of the reliction doctrine. The courts below adopted this approach. App. C at A-12; App. A at A-43. California contends, relying on common law authorities, that the uncovering of a lake may be so "sudden" that it is not gradual and imperceptible within the meaning of the reliction doctrine, even though its uncovering may not be a visible, "avulsive" movement at any one instant of time. For this purpose, California offered evidence of substantial shoreline movement over "short term" periods of hours, days, and weeks, and argued that no common law court has ever found changes of this speed and magnitude to be gradual and imperceptible.[10]

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[10] California's evidence showed, for example, that there have been hours where the shoreline at a particular location migrated more than 2 feet; over 1400 days during which the shoreline at a particular location migrated ten feet or greater; and over 150 days during which the shoreline at a particular location migrated 40 feet or greater, including instances where the shoreline migrated more than 100 feet in a single day. Pl. Ex. 6. Likewise, there have been over 1500 weeks since 1940 during which the shoreline at a particular location migrated more than five feet; over 225 weeks during which at a particular location the

The Ninth Circuit's opinion demonstrates the scarcity of federal authority addressing the meaning and application of the "gradual and imperceptible" test when it fails to cite any federal authority which actually applies the test in a discrete factual context or provides any workable standards to determine whether lake shoreline movements are gradual and imperceptible. Yet common law authority—disregarded by the Ninth Circuit—directly supports California's approach.

In *Boorman v. Sunnuchs,* 42 Wis. 233 (1877), the trial court found that a lake's recession was gradual and imperceptible because "a person watching the process would not see it recede from the original bank." *Id.* at 245. Applying the "*Lovingston* test" the Wisconsin Supreme Court reversed:

> It is very manifest that the water might have receded altogether too suddenly to have vested the title in the uncovered land in the plaintiff, and yet a person watching the pond be quite unable to see the waters recede. We take it that had the whole fall in the water occurred within a week, perhaps within a day, at a uniform rate, the human eye is not sufficiently acute to have detected the process. Yet if a portion of the bed was laid bare by a process so sudden, no

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shoreline migrated 125 feet or greater, including instances when the shoreline migrated 450 feet or more during a single week, *id.*; and there have been particular locations of the shoreline that have migrated 2400 to 4700 feet during a seven-month period. The United States criticized California for selecting profiles where shoreline movement was likely to be most prominent; California responded that it is appropriate to consider areas where changes are most noticeable because these areas confirm the existence of a dramatic recession that is occurring around the entire lake.

The United States' own presentation emphasized "average" rates of shoreline migration. See App. D at A-47. California criticized the use of averages as misleading. The land under and around Mono Lake is a mix of extremely flat and extremely steep slopes, ranging from slopes of less than 1 foot per 1000 feet to 800 feet per 1000 feet. Ct. Ex. 2-B at C-1 to C-7. Averaging rates of migration from steep and flat slopes therefore grossly distorts what an observer would be capable of actually seeing on the ground.

> one will contend that the portion thus uncovered became thereby the property of the owner of the land adjoining." *Id.*

Other courts also have found that changes to water boundaries are not necessarily gradual and imperceptible even though the changes were not observable as they occur. See e.g., *St. Louis v. Rutz,* 138 U.S. 226, 251 (1891) (movement of mass of land for one mile over course of several years "not imperceptible, in a legal sense"); *Attorney General v. Reeve,* 1 Times L.R. 675 (1885) (movement of beach visible from month to month and day to day *not* gradual and imperceptible); *McCafferty v. Young,* 397 P.2d 96, 100 (Mont. 1964); *Puyallup Indian Tribe v. Port of Tacoma,* 717 F.2d 1251 (9th Cir. 1983).

The sole federal authority that has applied a test for determining whether the recession of a navigable lake was gradual and imperceptible supports California's position. That is the unpublished Special Master's Report relied on by this Court in *Utah v. United States,* 420 U.S. 304 (1972).[11] Despite extensive briefing, both courts below disregarded the Special Master's Report. Using an approach that directly supports California's view of the test, the Special Master concluded that the recession of the Great Salt Lake was *not* "imperceptible" within the meaning of the reliction doctrine. *Utah v. United States,* No. 31 Original, Special Master's Report. ("Report") at 10, 15 n. 15, 18 n. 20.

The Special Master's finding that the recession of the Great Salt Lake was not gradual and imperceptible is significant here in a number of critical respects. First, rejecting the identical argument made by the United States here, the Special Master found that the recession of the Great Salt Lake was not gradual and imperceptible even though he found there was no avulsion. Report at 10. This negates a central assumption of the Ninth Circuit that there must be an instantaneously visible and violent avulsion to defeat application of the reliction doctrine.

Second, the Special Master, relying on hourly, daily, and weekly changes, found that the recession of the Great Salt Lake

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[11] The Special Master applied federal common law because *Bonelli* was good law at the time of his decision. Report at 5.

was not gradual and imperceptible even though there has been at "no particular moment a separate perceptible component." Report at 19. This further confirms that it is unnecessary to find that the recession of Mono Lake is visible at any particular instant of time in order to find that the overall process has not been gradual and imperceptible, and that it is proper to consider evidence of movement over short intervals.

Third, the Special Master rejected the use of averages endorsed by the Ninth Circuit in favor of an approach which emphasized the recession's actual effect on the shorelands. Report at 16-17.

Ignoring general common law authority, as well as the sole federal authority on point, the Ninth Circuit transferred California's title to the uncovered bed of Mono Lake by relying on dicta in cases that never applied the "gradual and imperceptible" test to a remotely similar set of facts. If the Court concludes that a federal common law of real property must now govern boundary disputes, it must adopt a test that, consistent with the broad range of common law authority, recognizes that the rapid uncovering of a lake may be gradual and imperceptible even though its movement is not visible at any one instant of time.

CONCLUSION

For these reasons, the Court should summarily vacate the judgment below, or issue the writ of certiorari to the Ninth Circuit.

Dated: April 21, 1987

Respectfully submitted,

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(Appendices follow)

Appendix A

For Publication
United States Court of Appeals
For the Ninth Circuit

No. 85-1965
D.C. NO. C-S-80-696-LKK

State of California, ex rel.
State Lands Commission,

Plaintiff/Appellant, v.

United States of America, Donald P. Hodel,*
Secretary of the Interior, et al.,
Defendants/Appellees.

Sierra Club, et al.,
Intervenors.

Appeal From the United States District Court for the
Eastern District of California,
Lawrence K. Karlton, United States District Judge, Presiding

Argued and Submitted April 14, 1986
San Francisco, California

Before: Kennedy, Reinhardt, and Brunetti, Circuit Judges

Reinhardt, Circuit Judge:

The State of California appeals from a judgment awarding the United States title to land exposed by the recession of Mono Lake. California argues that the district court erred in 1) adopting federal rather than state law as the rule of decision to determine the ownership of the exposed lake bed; 2) applying the law of reliction to the recession of Mono Lake; 3) selecting the methodology to be used in determining whether the recession of the Lake has been "gradual and imperceptible" for purposes of the reliction doctrine; and 4) granting intervention to the Sierra Club and the

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* Donald P. Hodel has been substituted for Cecil D. Andrus as defendant-appellee in this appeal pursuant to Federal Rule of Appellate Procedure 43(c)(1).

Natural Resources Defense Council. We affirm all of the district court's challenged rulings and uphold its judgment in favor of the United States.

I
FACTS

Mono Lake is a navigable lake that lies at the bottom of the Mono Basin immediately east of the Sierra Nevada in eastern California. All drainage in the Mono Basin flows toward the Lake; no outlet streams exist.

The United States owns approximately seventy percent of the uplands surrounding Mono Lake. The federal lands were withdrawn from the public domain in the early 1930's in order to protect the watershed and to preserve the land for grazing, recreation, and other uses. Private parties own the remaining thirty percent of the Mono uplands. The State of California owns the bed of Mono Lake, which, as land underlying navigable water within its boundaries, it acquired upon admission to the Union. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977).

In 1940, the City of Los Angeles, pursuant to permits issued by the State, began diverting water from Mono Lake's four main feeder streams to help supply the City's water needs. At that time, the Lake occupied an elevation of 6,417 feet above sea level. Increased diversions since 1974 have essentially halted the inflow to the Lake from the feeder streams. The lake waters have receded to an elevation of 6,380 feet above sea level; approximately 12,000 acres of lake bed have been uncovered as a consequence of the recession. The exposed lake bed contains valuable mineral and geothermal resources. The parties agree that the waters of Mono Lake will continue to recede as a result of the City's diversions.

II
PROCEDURAL HISTORY

California filed a quiet title action against the United States in 1980 to claim title to the exposed lake bed. The Sierra Club and

the Natural Resources Defense Council intervened on behalf of the United States. The parties filed cross-motions for summary judgment on the choice of law issue. California urged that state law, which it contended would vest title to the exposed lake bed in the State, should supply the rule of decision. The United States argued that the federal common law of reliction should apply. Under the federal rule, when a body of water serving as the boundary between two parcels of property gradually and imperceptibly recedes, the exposed land belongs to the upland owner. The doctrine of reliction contrasts with the avulsion doctrine, which provides that when a body of water serving as the boundary between two parcels of property violently shifts its course, the property boundary does not shift with the water, but remains in its former location. If the exposed lake bed constitutes relicted land, under federal common law the United States, as upland owner, would own the exposed bed as well.

The district court held that federal law governs the case and that the federal common law of reliction should supply the rule of decision. The case went to trial on the issue whether the disputed lands were formed by the process of reliction. The outcome turned on whether the recession of the Lake had been gradual and imperceptible. California and the United States disagreed over the proper methodology for determining whether a change in a water boundary has been "gradual and imperceptible." After a bench trial, the court adopted the methodology urged by the United States and ruled that the recession of Mono Lake had been gradual and imperceptible. The court awarded the United States the exposed lake bed under the law of reliction.

We review *de novo* the district court's decision to apply the federal rule of reliction to the recession of Mono Lake. *United States v. McConney,* 728 F.2d 1195 (9th Cir.) (en banc), *cert. denied,* 105 S. Ct. 101 (1984). We also review *de novo* the district court's choice of methodology to be used in determining whether the recession of the Lake has been gradual and imperceptible. *Id.* We review the findings made as a result of applying that methodology under the clearly erroneous standard. *Id.* A grant of permissive intervention is reviewed for an abuse of discretion. *Smith v. Pangilinan,* 651 F.2d 1320, 1325 (9th Cir. 1981).

III

ANALYSIS

A. Choice of Law

Federal law governs disputes over claims that there has been a reliction or accretion to federal land. *See California ex rel. State Lands Commission v. United States,* 457 U.S. 273, 283 (1982) (*State Lands Commission*).[1] California does not dispute that federal law governs the present case since the United States owns the uplands to Mono Lake and claims title to the exposed lake bed. Controversies governed by federal law, however, do not necessarily require the application of a uniform federal rule of decision. In some categories of cases, courts must balance the federal and state interests in the application of their own rules to the issue at hand, and, where the balance favors doing so, borrow state law as the rule of decision. *Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 671-72 (1979). California argues that the present case is a proper one for the application of the *Wilson* balancing test, and that under that test state law should supply the rule of decision.

California's assumption that we may adopt state law as the rule of decision in this case under the *Wilson* balancing test is erroneous in light of the Supreme Court's decision in *State Lands Commission. State Lands Commission* involved a dispute between California and the United States over accretions to federally-owned ocean front land. California owned the submerged

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[1] Although *State Lands Commission* involved accretions to federal land, whereas this case involves an alleged reliction, neither party suggests that the difference has any relevance to the choice of law determination. An "accretion" occurs where bits of rock, sand, and dirt accumulate on a shore and push the water line back, thereby creating new land. A "reliction" occurs where land is exposed by the imperceptible recession of water. The "terms are often used interchangeably, and law relating to accretions applies in all its features to relictions." 3 *American Law of Property* § 15.26 at 855 (A.J. Casner ed. 1952) (cited in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 387 n.7 (1977) (Marshall, J., dissenting on other grounds)).

tidelands by virtue of its sovereign status. California alleged that under state law, it was entitled to the accretions because of its ownership of the submerged tidelands. The United States alleged that under federal law, it was entitled to the accretions because of its ownership of the uplands abutting the submerged tidelands. The Supreme Court held that because Congress has addressed the issue of accretions to federal lands abutting state-owned submerged lands in section 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1982), that section precludes borrowing for federal law purposes a state rule that would "divest" the United States of ownership of accreted lands. 457 U.S. at 283-84. Section 3 of the Act confirms and vests in the states "title to and ownership of the lands beneath navigable waters within [their] boundaries." 43 U.S.C. § 1311(a); section 5(a) of the Act withholds from the operation of section 3 all "accretions" to lands acquired or reserved by the United States.[2] In light of section 5(a), the Court "appl[ied] the federal rule that accretions, regardless of cause, accrue to the upland owner," and ruled that the United States held title to the disputed land. 457 U.S. at 285.

Because in the present case the United States' claim is based in part on section 5(a) of the Submerged Lands Act,[3] we follow *State Lands Commission* and apply a federal rule of decision; we do so without balancing, under *Wilson*, the varying federal and state interests in the application of their respective law. California claims the exposed lake bed by virtue of its sovereign ownership

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[2] In relevant part, section 5(a) excepts "all tracts or parcels of land together with all accretions thereto . . . title to which has been lawfully and expressly acquired by the United States . . . , and all lands . . . expressly retained by or ceded to the United States when the State entered the Union." 43 U.S.C. § 1313(a). Although the statute expressly mentions "accretions" only in connection with federal acquired lands, accretions to retained lands are similarly excepted from the operation of section 3. *State Lands Commission*, 457 U.S. at 283 n.11.

[3] The Submerged Lands Act applies to lands beneath inland lakes as well as coastal waters. *See* 43 U.S.C. § 1301(a) ("[t]he term 'lands beneath navigable waters' means (1) all lands within the boundaries of each of the respective States which are covered by nontidal [navigable] waters . . . as . . . modified by accretion, erosion, and reliction.").

of the submerged lake bed. The United States claims the lands by virtue of its status as a littoral owner. As we have noted, relictions are treated in the same manner as accretions, *see supra* note 1; section 5(a)'s reservation of accretions therefore encompasses relictions. Thus, section 5(a) reserves from California's ownership of the Mono lake bed all relictions to the federal uplands. In light of section 5(a), *State Lands Commission* precludes us from borrowing a state rule that would "divest" the United States of ownership of the relicted land and award it to the state.

That California disputes the United States' contention that the recession at Mono Lake constitutes a reliction does not affect the choice of law determination under *State Lands Commission*. Although the Court there noted that both parties agreed that the disputed land constituted an accretion, 457 U.S. at 287, the Court did not suggest that had the parties disagreed over the proper characterization of the change in the land, state law could have been adopted as the standard for determining the question. The Court's rationale for the application of a federal ownership rule—that section 5(a) forecloses "borrowing for federal-law purposes a state rule that would divest federal ownership" of land that is the subject of that section, 457 U.S. at 284—mandates the application of federal principles of law in characterizing the disputed land changes in this case. A state's definition of accretions and relictions may be no less hostile to federal interests than its ownership rules.

California argues against the application of *State Lands Commission* to the present case on several grounds, all of which we reject. First, California argues that section 5(a) does not affect the choice of law determination in disputes involving inland waterways. It contends that because the Act merely *confirms* the states' title to submerged lands beneath their inland waterways, whereas it *vests* title in the states to submerged coastal lands, it has no "substantive legal effect" with regard to inland waterways. This analysis is erroneous. Section 5(a) excepts from the operation of section 3 federal lands and all accretions thereto. That "substantive legal effect" is independent of the distinction in section 3 between a grant and a confirmation of the states' title. Congress' authority to except accretions from its confirmation of

title to submerged inlands is no different from its authority to except accretions from its grant of title to submerged coastal lands. Section 5(a) therefore has the same choice of law consequence in an inland waters dispute as in a coastal waters dispute.

California attempts to support its claim that section 5(a) of the Submerged Lands Act has "no substantive legal effect" with regard to inland waters, and hence that *State Lands Commission* does not govern the present case, by pointing to the fact that the Supreme Court in *Wilson v. Omaha Indian Tribe,* 442 U.S. 653 (1979), adopted a state rule of decision in an inland waters property dispute without mentioning the Submerged Lands Act. California infers from that fact that the Court shares its view of the Act as irrelevant to inland waters disputes. In further support of this claim, California notes that in this circuit we have followed *Wilson* by adopting a state rule of decision in three cases involving inland waters disputes without making any reference to the Act. *See Puyallup Indian Tribe v. Port of Tacoma,* 717 F.2d 1251 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 1324 (1984); *United States v. Aranson,* 696 F.2d 654 (9th Cir.), *cert. denied,* 104 S. Ct. 423 (1983); *United States v. Harvey,* 661 F.2d 767 (9th Cir. 1981), *cert. denied,* 103 S. Ct. 74 (1982).

California's argument fails. Section 5(a) of the Act had no application to the factual situation in *Wilson.* In *Wilson,* land from an Indian reservation on the west bank of the Missouri River was eroded by the River and deposited on the east bank, which was owned by a number of parties including Iowa. The Tribe and the east bank landowners each claimed the land. The Tribe claimed that the land deposited on the east bank remained part of the reservation under the doctrine of avulsion.[4] The east bank landowners claimed the land as an accretion to their riparian property. The parties disputed whether federal or state law should be used to decide whether the land in dispute had formed by the process of avulsion or accretion. The Court held that there is no need for a uniform federal rule to govern disputes between the United States and other riparian owners. As long as states apply their rules governing riparian ownership even-handedly, the

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[4] For a definition of avulsion, see *supra* at p. 4.

United States stands to gain land from, as often as it would lose land to, the opposing riparian owner. *Wilson,* 442 U.S. at 673. Moreover, were federal law to govern disputes between the United States and other riparian owners, those other owners' rights would be subject simultaneously to different laws, depending fortuitously upon whether the non-federal owner asserted its rights against a federal or against a non-federal party. *Id.* at 647.

Since *Wilson* involved a dispute between riparian owners, the case did not implicate section 5(a) of the Submerged Lands Act. Although Iowa was a party to the dispute, it did not rely on its sovereign status as owner of its submerged lands in claiming the land but rather on its riparian rights. It stood in no different position than the other east bank owners.

Section 5(a) comes into play only in disputes between the United States and a state claiming land by virtue of its sovereign ownership of submerged lands. The section excepts accretions to federal land from the grant or confirmation of *submerged lands* to the states; that exception does not affect disputes concerning the rights of other riparian or littoral owners.

Moreover, although we do not apply the *Wilson* balancing test here, the various factors that comprise that test suggest why federal law must govern disputes between the United States as a riparian or littoral owner and the state as a submerged lands owner. First, the state and the United States will always occupy the same relative positions in such disputes. The state, therefore, could adopt property rules that would always award disputed land to the submerged lands owner and thus that would always be injurious to the interest of the United States. Second, application of a federal rule to submerged lands disputes between a state and the United States will not have an arbitrary impact on any private property rights or interest, since they will continue to be governed in each instance by state law.

None of the three Ninth Circuit cases cited by California implicated the Submerged Lands Act, since none involved disputes between the United States as a riparian or littoral owner and a state as a submerged lands owner. *See Puyallup Indian Tribe v. Port of Tacoma,* 717 F.2d 1251 (9th Cir. 1983), *cert. denied,* 104

S. Ct. 1324 (1984); *United States v. Aranson,* 696 F.2d 654 (9th Cir.), *cert. denied,* 104 S. Ct. 423 (1983); *United States v. Harvey,* 661 F.2d 767 (9th Cir. 1981), *cert. denied,* 103 S. Ct. 74 (1982).

Second, California argues that *State Lands Commission* does not apply because, as the Court stated, it was "not a case in which federal common law must be *created,*" 457 U.S. at 284 (emphasis in original), whereas, according to California, the present case necessitates the creation of new law. California claims that what it terms "the intentional uncovering" of a lake presents a novel circumstance within federal law. It argues, on that basis, that federal law must be created in order to determine whether the recession at Mono Lake constitutes a reliction.

We reject California's argument. First, the Supreme Court in *State Lands Commission* did not suggest that section 5(a) mandates the adoption of a federal rule of decision *only* where federal law is well-settled. Second, the law of reliction *is* well-settled, *see State Lands Commission,* 457 U.S. at 284, and it encompasses the recession that occurred at Mono Lake. Federal law defines a reliction as previously submerged land which becomes exposed by the gradual recession of water. *See, e.g., United States v. Ruby,* 588 F.2d 697, 701 n.4 (9th Cir. 1978), *cert. denied,* 442 U.S. 917 (1979); *Bear v. United States,* 611 F. Supp. 589, 593 n.2 (D. Neb. 1985). The federal law makes no exception for relictions or accretions resulting from artificial causes. *See, e.g., State Lands Commission,* 457 U.S. at 285; *County of St. Clair v. Lovingston,* 90 U.S. 46, 66 (1874); *United States v. Claridge,* 416 F.2d 933, 935 (9th Cir. 1969), *cert. denied,* 397 U.S. 961 (1970). The Supreme Court has applied the accretion doctrine to additions to lake uplands resulting from artificial causes. *See Jones v. Johnston,* 59 U.S. 150, 152 (1856) (accretions to shore of Lake Michigan resulting from construction of harbors and piers); *see also Banks v. Ogden,* 69 U.S. 57 (1865). California attempts to distinguish *Jones* and *Banks* by characterizing the recession as an "intentional uncovering." It then seeks to bring this case under state case law awarding to the state lands that are deliberately exposed by a reclamation project. This attempt fails. That the recession may have been a "necessary effect" of the City's

diversion of the Lake's feeder streams does not mean that the land was intentionally uncovered. Moreover, California does not challenge the district court's finding that the diversions at the Mono Basin do not constitute a drainage or reclamation project. It is clear, in fact, that when the State authorized the City to divert the water from the feeder streams neither the City nor the State was motivated by a desire to reclaim any lands underlying Mono Lake.

Finally, even were California correct that this case necessitates the "creation" of law, we would not on that basis find the case inappropriate for decision under a federal rule. California's argument is anomalous; it overlooks the fact that the cases which now constitute established law themselves necessarily "created" law when they were first decided.

We conclude that under *State Lands Commission* the district court properly adopted the federal reliction doctrine as the rule of decision in the present case. Moreover, even were we to analyze the choice of law question under the *Wilson* balancing test, we would reach the same result. For the reasons discussed *supra* at 11, the *Wilson* factors would mandate adoption of a federal rule of decision in case in which a state claims lands by virtue of its status as the submerged lands owner and the United States claims those same lands as the littoral or riparian owner.

B. Application of the Reliction Doctrine

When a body of water defines the boundaries of private property, problems of boundary definition will arise when the water body shifts its course or changes in volume. The doctrines of accretion and reliction on the one hand and avulsion on the other provide a framework for resolving boundary disputes arising from the dynamic nature of water. When a water line that constitutes a property boundary changes gradually and imperceptibly by the gradual deposit of solid material on its shore (accretion) or by gradual recession (reliction), the property boundary changes with it. *See Bonelli Cattle Co. v. Arizona,* 414 U.S. 313, 325-26 (1973), *overruled on other grounds, Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977). In such a situation, title is "ambulatory." However, where a water

line changes violently and visibly, i.e., by avulsion, the property boundary does not change with the water but remains where it was prior to the change. *See Philadelphia Co. v. Stimson,* 223 U.S. 605, 624 (1911).

California claims that the district court misapplied the test for determining whether a reliction is "gradual and imperceptible." In its conclusions of law, the court quoted the federal common law rule of perceptibility (the "*Lovingston* test"):

> It is not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."

Stimson, 223 U.S. at 624 (quoting *County of St. Clair v. Lovingston,* 90 U.S. 46, 68 (1894)). The district court found as a fact that the average person would not have observed the movement of the shoreline as it was occurring.

California does not challenge the court's finding that an average person would not have observed the shoreline migrations as they were occurring.[5] Rather, it attempts to replace the perceptibility test with a measurability test. Since the shoreline migrations were *measurable* over relatively short periods of time, California argues that they were not "gradual and imperceptible." At trial, California presented computer-generated data of shoreline migrations occurring over periods of weeks, days or hours. It computed those migrations at selected areas of the Lake with the gentlest shoreline slopes. In such areas, a small change in lake elevation will produce a greater change in shoreline position than where the shore slope is steep. California gathered its data during periods of greatest daily and annual evaporation. It admits that daily shoreline migration correlates with variations in evaporation.

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[5] California's own expert testified that he never actually perceived the shoreline migrations while at the Lake and that an average observer would not be able to do so.

We need not determine here whether the *Lovingston* perceptibility test should be literally applied, though such an application may well be the proper one. Here, the methodology adopted by the district court for determining whether the shoreline change was gradual and imperceptible was in fact consistent with ultilization of a measurability standard, the standard suggested by California, and constituted as favorable an application of *Lovingston* as the state could possibly have been entitled to.

The district court took into account measurable changes in the Mono shoreline. It reached its conclusion that the recession was "gradual and imperceptible," however, by averaging measurable shoreline change over the entire lake shore and by discounting those changes attributable to daily evaporation and seasonal fluctuations. The district court calculated average shoreline migration on the basis of ninety percent of the daily declines since 1940 and on a set of twenty-six profiles of the shore slope from around the Lake. The average shoreline migration since 1940 has been .30 feet per day on the steeper western side of the Lake and .32 feet per day on the gentler eastern side. As these migration figures show, shoreline migration over the Lake as a whole has clearly not been sudden and perceptible. More important, California's gradual loss of its property in the lake bed as a whole over the last several decades is in no way comparable to a riparian owner's sudden loss of property when a river violently changes course.

California's real complaint is with the court's use of averages for determining whether the shoreline change was gradual and imperceptible, although California does not challenge that methodology explicity. We find the court's methodology to constitute a sensible interpretation for the *Lovingston* perceptibility test, especially in the context of a lake. We affirm the district court's use of that methodology in determining whether the Mono Lake recession was gradual and imperceptible.

D. Grant of Intervention

The district court did not specify whether it granted intervention to the Sierra Club and the Natural Resources Defense Council as of right under Fed. R. Civ. P. 24(a) or permissively

under Fed. R. Civ. P. 24(b). California challenges the grant under the abuse of discretion standard appropriate to permissive intervention under Rule 24(b). We treat the grant as permissive and review it under an abuse of discretion standard.

We hold that the court did not abuse its discretion in granting intervention to the Sierra Club and the Natural Resources Defense Council. The intervenors' defense to California's suit presented questions of law and fact in common with the main action. Moreover, California does not allege that it has been unduly prejudiced by the intervention.[6] Thus, the grant was proper.

IV
CONCLUSION

We affirm under *State Lands Commission* the district court's choice of a federal rule of decision in the present dispute. We affirm the court's application and construction of the federal law of reliction to the recession at Mono Lake, and thus affirm the judgment granting the United States title to the exposed lake bed. We affirm the grant of intervention. AFFIRMED

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[6] We need not consider whether or under what circumstances an erroneous grant of intervention could constitute reversible error under Fed. R. Civ. P. 61.

Appendix B

United States District Court
Eastern District of California

No. Civil S-80-696 LKK

State of California, ex rel.
State Lands Commission,
Plaintiff,

v.

United States of America, et al.,
Defendants.

ORDER

[Filed Sept. 1, 1983]

This case is one of a triad presently pending before this court concerning the future of Mono Lake and, by virtue of its tributories being a major source of water for the County of Los Angeles, the future of that great metropolitan area. Mono Lake's unique ecological values and its importance as a source of water for the County of Los Angeles have given rise to a vast literature (*see National Audubon Society v. Superior Court,* 33 Cal. 3d 419, 424 n.2 (1983)), and has recently been discussed at length by the California Supreme Court. *Id.* No useful purpose would be served by restating here the many observations of either Mono Lake's importance as a unique ecological resource or its importance as a water resource.

This suit was brought by the State of California to quiet title to lands surrounding the lake which have been exposed by virtue of the recession of its waters.[1] The parties have filed cross motions

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[1] The State of California, at a Status Conference, inquired of the United States as to whether it would stipulate that the lands in issue were "relicted" lands. The term "reliction" refers to the gradual and imperceptible uncovering of land by the lowering of water rather than sudden or seasonal exposure of the land. *See United States v. Ruby Co.,* 588 F.2d 697, 701 (9th Cir. 1978); 93 C.J.S. Waters § 78, and *see* Section III, *infra.* The United States ultimately offered to stipulate, but the State then declined to do so. California now takes the position that

for partial summary judgment concerning the appropriate choice of law and thereby seek to determine what law applies to resolution of this case. The State of California argued initially that California law applied while the United States of America, supported by intervenor Sierra Club, argued that federal common law applied. Subsequent to the decision of the United States Supreme Court in *State of California, ex rel. State Lands Commission v. United States,* ____ U.S. ____, 102 Sup. Ct. 2432 (1982), the State conceded that the applicable choice of law was federal but argued that the court should adopt California law as the federal rule of decision.

I
FACTS[2]

Mono Lake is the second largest lake in California. It sits at the base of the Sierra Nevada escarpment near the eastern entrance to Yosemite National Park. *National Audubon Society v. Supe-*

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there is insufficient evidence concerning "the speed or perceptibility of the recession of Mono Lake's waters." California Memorandum of Points & Authorities, November 3, 1981 at 5. Because there is an insufficient predicate to determine whether the lands are "relicted" (*see* Section III, *infra*), the court will refer to them as "exposed" lands. Nonetheless, both sides have argued the instant motion as if the issue involved "relicted lands."

[2] In general the facts stated herein are drawn from a stipulated statement of facts, agreed upon by the parties, or the contents of the "Report of Interagency Task Force on Mono Lake" (Dec. 1979), hereinafter "Task Force Report;" both parties have requested the court to take judicial notice of this document pursuant to Fed. R. Evid. § 201(d). *See Latta v. Western Inv. Co.,* 173 F.2d 99, 103 (9th Cir. 1949), *cert. denied,* 337 U.S. 940. The Interagency Task Force on Mono Lake was created to investigate and determine what course of action was proper to protect the natural resources of the Mono Basin. The Task Force was composed of representatives of various federal agencies having management responsibilities (including the United States Bureau of Land Management, the United States Fish and Wildlife Service, and the United States Forest Service), and representatives of both the City of Los Angeles and the State of California. Task Force pp. 1-6. The City of Los Angeles apparently refused to "sign off" on the final report.

rior Court, 33 Cal. 3d at 424. It was at the time of California's admission into the Union and is now a navigable body of water although it has no outlet. Task Force Report p. 15. Other than precipitation, the sole source of water inflow into Mono Lake is drainage from the western side of the Mono Basin which funnels spring and summer run-off into the lake through four major streams: Lee Vining, Walker, Parker, and Rush Creeks. Task Force Report p. 11-12. Total inflow into the lake, including rainfall, is an average of 168,000 acre feet per year. Task Force Report p. 11. In the middle of the lake is Negit Island which historically has been used by the California Gull and other species of birds as a rookery. The rookery is a nesting area for approximately 25% of the world's population of the California Gull and a feeding area for both the largest known population of Eared Grebes and one-third of the world's population of Wilsons Phalaropes. Task Force Report at 15-20.

The Department of Water and Power of the City of Los Angeles (hereafter "DWP") received permits in the 1930's for the diversion of water from the four creeks. Pursuant thereto they constructed the Mono Basin Project. In 1941 DWP received a license from the State Water Resources Control Board to commence the diversion of 100,000 acre feet from the creeks. Task Force Report at 6, 12, 13. Since 1941, and consistent with the diversion noted above, the level of the lake began to decline. *Id.* at 15. DWP obtained a further license for increased diversions in 1974 to a maximum diversion of 167,000 acre feet per year from the Mono Basin. *Id.* at 13. In essence, the water exports pursuant to the licenses obtained by DWP have reduced the releases into Mono Lake to essentially zero, *id.,* and the level of the lake has been declining at a rate of one to two feet per year. *Id.* at 15. As a result of these diversions, the parties stipulate that the waters of Mono Lake will continue to recede.

Almost all of the land in the Mono Basin is under federal ownership and is administered by the Bureau of Land Management. Task Force Report at 11 (*see* n.4). Public lands in the Mono Basin were withdrawn from patent through Presidential Executive Orders in 1929 and in 1930. In 1931 Congress adopted Public Law 864. This act withdrew approximately 200,000 acres

of public lands including those riparian to the feeder streams of Mono Lake, those littoral to Mono Lake and those located on Negit Island, from the public domain. This was done for the purpose of protecting the watershed supplying the water to the City of Los Angeles and other communities and for grazing, recreation, and other uses.[3]

As the level of the lake receded pursuant to DWP's diversions, lands between the elevation level of the lake in 1941 at 6,417, and its present elevation level became exposed. In early 1979, due to the recession of the lake, and the alleged sequel of environmental damages, inquiries were made by the Sierra Club of the Secretary of Interior as to what the department would do pursuant to the Federal Land Policy Management Act to protect the federal resources in the Basin. As the department explored the problem posed by the Sierra Club it became clear that a dispute existed between the State of California and the Department of Interior as to the ownership of the exposed lands.[4] That dispute led to the instant litigation. As the State succinctly put it, "the question to be answered in this case is whether California, the owner of the lake bed, or the United States, the owner of the once littoral upland public domain, is the owner of the exposed lands."[5]

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[3] The exact effect of this withdrawal is the subject of another lawsuit in the triad. *See Sierra Club, et. v. United States, et at.*, Civil No. S-80-282 LKK.

[4] By the Treaty of Guadalupe Hildago (9 Stat. 922) the United States obtained, inter alia, all title to the ceded territory subject only to the provisions of the treaty. *Borax Consolidated v. Los Angeles,* 296 U.S. 10, 15 (1935); *Palmer v. Low,* 98 U.S. 63 (1878); *F.A. Hihn Co. v. City of Santa Cruz,* 170 Cal. 436 (1915). By virtue of the act of admission of California to the Union (9 Stat. 452) and the equal footing doctrine (*see* n.5), California acquired title to the beds underlying its waters. This title was confirmed to the State by the Submerged Lands Act, 43 U.S.C. § 1301 et seq.

[5] The parties do not dispute that by virtue of California's sovereignty and the doctrine of equal footing, the State acquired title to the ordinary high water mark of the beds of all navigable waterways upon its entrance into the Union. *Martin v. Waddell,* 16 Pet. 367, 410 (1842); *Pollard's Lessee v. Hagan,* 3 How. 212, 229-301 (1845). Nor do the parties

II

CHOICE OF LAW AND RULE OF DECISION

Prior to the decision of the United States Supreme Court in *California ex rel. State Lands Commission v. United States,* ____ U.S. ____, 102 S.Ct. 2432 (1982), a vigorous and realistic dispute existed between the parties as to whether or not California or federal law governed resolution of this case. California, however, has conceded that under that case "the fact that the United States has never yielded title or terminated its interest in lands adjoining navigable waters is sufficient to require the application of federal law."[6] Moreover the State, although it previously argued otherwise, now concedes that "there does exist a federal common law of accretion and avulsion, at least as to ocean front lands." Nonetheless, California "vehemently disagrees that the application of federal law to this land title dispute requires resort to federal rules of decision." It argues that the rationale of *California ex rel. State Lands Commission v. United States* as it relates to the selection of a rule of decision does not apply. Rather, the State asserts, that "*Wilson [v. Omaha Indian Tribe,* 442 U.S. 653 (1979)] continues to require the application of state law in determining the ownership of the [exposed] lands in inland waters."[7]

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dispute that subsequently the United States acquired a fee to the ordinary low water mark.

[6] Where "federal interests [are] at stake, . . . the choice of applicable law presents a federal question." *North Dakota v. United States,* ____ U.S. ____, 103 S.Ct. 1095, 1105 (1983). Because this is a case resolving title to federal lands, that federal interest requires application of federal choice of law rules. *California ex rel. State Lands Commission v. United States,* ____ U.S. ____, 102 S.Ct at 2438. Although federal choice of law principles apply, as I note in the text, this does not necessarily resolve the issue of choosing the appropriate rule of decision; moreover, the Rules of Decisions Act, 28 U.S.C. § 1652, has no direct dispositive application to the instant issue. *See DelCostello v. International Brotherhood of Teamsters,* ____ U.S. ____, 76 L.Ed.2d 476, 485 n.13 (1983).

[7] The issue of whether California law should be used as the rule of decision in this case is critical. Here, as in *California ex rel. State Lands*

California's concession that federal law governs is wholly appropriate. Both the teaching of *California ex rel. State Lands Commission v. United States,* and *Wilson,* make it clear that federal law rather than state law governs disposition of issues concerning title to land with respect to which the United States "has never yielded title or terminated its interest." *Wilson v. Omaha,* 442 U.S. at 670, *quoted in California ex rel. State Lands Commission v. United States,* ___ U.S. ___, 102 S.Ct. at 2438.

California argues, however, that even if the issue must be resolved by resort to federal law, state law may nevertheless provide the source of that federal law. As the Supreme Court observed "[c]ontroversies governed by federal law do not inevitably require resort to uniform federal rules. [citation omitted] It may be determined as a matter of choice of law that, although federal law should govern a given question, state law should be borrowed and applied as the federal rule for deciding a substantive legal issue at hand. [citations omitted]" *California ex rel. State Lands Commission v. United States,* ___ U.S. ___, 102 S.Ct. at 2438. California argues that the Supreme Court's decision in *California ex rel. State Lands Commission v. United States,* requiring the application of "federal common law" as the source of the rule of decision does not apply here for two reasons. First, it argues that the instant case deals with inland waters whereas *California ex rel. State Lands Commission v. United States* concerned tidelands. Second, it notes that the Supreme Court in that case rested its decision on the Submerged Lands Act which, it argues, has no application to the instant case. Concluding that the rationale for the application of federal common law in *California ex rel. State Lands Commission v. United States* has no application to the instant case, the State then argues that a

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Commission v. United States, the state asserts that its rule relating to "artificial accretion," *see California ex rel. State Lands Commission v. United States*, ___ U.S. ___, 102 S.Ct. at 2435, requires an ultimate determination in its favor. The United States on the other hand argues that under federal law relicted land belongs to the littoral owner and thus the United States must ultimately prevail. *See* Section III, *infra.*

three pronged test for determining applicability of federal or state law as the Federal Rule of Decision should apply.[8]

A. The Submerged Lands Act

The Supreme Court in *California ex rel. State Lands Commission v. United States* held that "dispositive" of the issue of whether federal law supplied the rule of decision in that case was the fact that "Congress has addressed the issue of accretions to federal land." *California ex rel. State Lands Commission v. United States,* ____ U.S. ____, 102 S.Ct. at 2438. The Court explained that "the Submerged Lands Act, 43 U.S.C. § 1301, *et seq.*, vested title in the States to the lands underlying the territorial sea . . . The Act also confirmed the title of the states to the tidelands up to the line of mean high tide. Section 5 of the Act, however, withheld, from the grant to the states all 'accretions' to coastal lands acquired or reserved by the United States. 43 U.S.C. § 1313(a). In light of this provision, borrowing for federal law purposes a state rule that would divest federal ownership is foreclosed." *Id.* ____ U.S. ____, 102 S.Ct. 2438-39. The state argues that these passages demonstrate that *California ex rel. State Lands Commission v. United States* is inapplicable to the matter at bar. First, it argues that '[t]he Submerged Lands Act was not intended to create substantive property rights in lands lying under inland waters. It only confirmed ownership to these lands which everyone knew that the individual states already owned."[9] This aspect of the State's argument is really composed

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[8] The State describes the three pronged test as (1) whether there is a need for a national uniform body of law to apply in comparable situations; (2) whether application of state law would frustrate federal policy or functions; and (3) the impact a federal rule might have on existing relationships under State law. Memorandum of Points and Authorities in Further Support of Plaintiff's Motion for Summary Judgment, p.14. It cites in support of this three pronged test *Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 672-73 (1979).

[9] The State points to the legislative history of the Act to demonstrate that both congressional supporters and detractors of the Act agree that the confirmation of these lands was merely a reaffirmation of existing law. It cites in this regard H.R.Rep. No. 1778 80th Cong. 2nd Sess.

of two separate strands—one, that Congress did not intend to reach questions of inland waters, and two, that because California acquired title to the beds of inland waters upon its admission to the Union, the Submerged Lands Act could not affect that title in any event. Next, making much of the fact that the Supreme Court limited its observations concerning section 5 to "coastal lands" in *California ex rel. State Lands Commission v. United States* the State argues that the case has no application to inland waters.

I first turn to the question of statutory interpretation. "As with any case involving statutory interpretation, 'we state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language.' [citations omitted] 'Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' " *North Dakota v. United States,* ____ U.S. ____, 103 S.Ct. 1095, 1102-03 (1983).[10]

(1948), reprinted in 1953 U.S. Code Cong. & Ad. News 1425; S.R. Rep. N.133, 83 Cong. 1st Sess. (1953) reprinted in 1953 U.S. Code Cong. & Ad. News 1474; Minority views to accompany H.R. 5992, reprinted in 1953 U.S. Code Cong. & Ad. News 1439; Minority views to S.J. 13, reprinted in 1953 U.S. Code Cong. & Ad. News 1543, 1553.

[10] The varying expressions of the United States Supreme Court as to the force, effect, and nature of the "plain meaning rule" are extremely perplexing. These variances have in turn caused this court to express itself about the plain meaning rule in a variety of cases in a variety of ways which the court says, frankly, to its embarrassment, are sometimes contradictory. *See and compare, e.g., United States v. Salsedo,* 477 F.Supp. 1235, 1240 (E.D.Cal. 1979) ("The words are plain and unambiguous—thus no construction is required or indeed permitted.") with *Consortium of Community Based Organizations v. Donovan,* 530 F.Supp. 520, 527 (E.D.Cal. 1982) ("Nonetheless, recent Supreme Court and Ninth Circuit cases make it clear that the 'plain meaning' rule is no longer absolute but rather a flexible principle for ascertaining Congressional intent."); compare both with *United States v. Veon,* 538 F.Supp. 237, 243 (E.D.Cal. 1982) ("As with any issue of statutory construction, consideration 'begins, as indeed it must, with the text and legislative history' [citations omitted]." In text I apply the expression of the rule found in *North Dakota v. United States,* a 1983 case, which has

In accordance with *North Dakota's* admonition, I turn to the statutory language to determine whether the Submerged Lands Act by its terms recognizes a distinction between coastal tidelands and lands littoral to inland waters. The plain words of the statute simply do not support the State's position. Nowhere in section 1313 is a distinction made between coastal and inland waters. On the contrary, the statute speaks to "all tracts or parcels of land together with all accretions thereto . . . lawfully and expressly acquired by the United States . . ."[11] Indeed, section 1311(a) grants to the states "the lands beneath navigable waters within the boundaries of the respective States," which is defined by section 1301(a)(1) to be "all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union . . . ." In turn section 1313(a) excepts from the operation of section 1311 "all tracts or parcels of land together with all accretions thereto." As *California ex rel. State Lands Commission v. United States* taught, it is this reservation which resolves the issue of the source of the rule of decision. By its terms the statute makes no distinction between coastal and inland waters. The Ninth Circuit put the proposition as follows: "Confirming prior case law, the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. § 1301(a)(1), in effect quit

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the virtue of being a later expression of the Supreme Court's view than *Watt v. Alaska*, 451 U.S. 259 (the 1981 case relied on by this court in *Consortium of Community Based Organizations*) or *Busic v. United States*, 446 U.S. 398 (the 1980 case relied upon by this court in *United States v. Veon*). Ours is a three level judicial system, reflecting the functions of each court. Thus, district courts decide cases, courts of appeal review for error, and the United States Supreme Court teaches. For obvious reasons, no court can strictly restrict itself to its paradigmatic role; nonetheless the system depends on each court being attentive to its primary responsibility while dispatching its other duties.

[11] Although the specific language relied upon by the court to determine that Congress spoke to this issue appears to relate solely to land "acquired by the United States" the Supreme Court definitively determined that "accretions to retained land should be similarly excepted from the grant to the States." *California ex rel. State Lands Commission v. United States*, ___ U.S. ___, 102 S.Ct. at 2438 n.11.

claims to the states '. . . all lands . . . covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, . . . up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction . . . '" *United States v. Claridge,* 416 F.2d 933, 934 n.1 (9th Cir. 1969) (dictum). While to coin a phrase, much water has passed over the dam since 1969, the circuit's dictum wholly accords with, and indeed is compelled by, the subsequent decision of the Supreme Court in *California ex rel. State Lands Commission v. United States, supra.*

The State's suggestion based on legislative history also seems in error. It argues that, since the Submerged Lands Act did not "create substantive property rights with respect to ownership of lands underneath inland waters, it can provide no independent basis for the application of federal law in this case." Memorandum of State of California, p.7. The State, relying upon the legislative history (*see* n.9), argues that its acquisition of the lands underlying the inland waters was unaffected by the Submerged Land Act and, accordingly, the littoral rights of the United States were unaffected by the Act. The State's argument begs the question. The issue is not whether the Submerged Lands Act affected the initial grant to the State of the lands underlying the inland waters, but what changes effected by accretion have upon the title originally acquired. As to this question, the Supreme Court has taught that the reservation of accretions in section 1311 is dispositive. In effect, the State's argument is simply a disguised way of saying that the Supreme Court's decision in *California ex rel. State Lands Commission v. United States* is wrong. This court is, of course, simply not free to make such a judgment.

Nor may the State take solace in the fact that the specific ruling of the Supreme Court in *California ex rel. State Lands Commission v. United States, supra* was cast in terms of coastal lands. No negative pregnant can be fairly inferred from that fact. The Court was speaking, as courts do, to the case that was then before it—namely coastal lands. The question considered here is not whether the court spoke to inland waters, but whether the statute does. It seems clear that the same reasoning employed by the Supreme Court in *California ex rel. State Lands Commission*

v. United States compels a conclusion that it does. To paraphrase the specific holding of the United States Supreme Court in *California ex rel. State Lands Commission v. United States* so that it applies to the issue before the court, the rule is that "[t]he Act also confirmed the title of the States to the [land under the inland waters] up to the line of [the] mean high [watermark]. Section 5 of the Act, however, withheld from the grant to the States all 'accretions' to [lands littoral thereto] acquired or reserved by the United States. 43 U.S.C. § 1313(a). In light of this provision, borrowing for federal law purposes a state rule that would divest federal ownership is foreclosed. In *Wilson,* where [the Supreme Court] did adopt state law as the federal rule, no special federal concerns, let alone a statutory directive, required a federal common law rule." *California ex rel. State Lands Commission v. United States,* 102 S.Ct. at 2438-39.

B. Inland versus Tideland Waters

The State also argues that the Supreme Court, in *California ex rel. State Lands Commission v. United States,* relying on *Hughes v. Washington,* 389 U.S. 290 (1967), found that the "federal government's international relations interest in the territorial sea remains sufficiently different to justify a federal common law rule of riparian ownership along the oceanfront." Memorandum of State of California regarding *California ex rel. State Lands Commission v. United States* p.5. The State thus seeks to distinguish *California ex rel. State Lands Commission v. United States* on the basis that the Supreme Court in that case dealt with the "special" need for a federal rule arising out of the international character of ocean front land. It then argues that "[t]his special federal concern over boundaries to coastal lands is absent in the Mono Lake title case." Memorandum of California re *California ex rel. State Lands Commission v. United States* p.5 In their briefs neither the United States nor intervenors directly confront this issue. Rather, they simply argue that under *California ex rel. State Lands Commission v. United States* all property rights in which the United States is the holder of title are to be governed not only by federal law, but by the federal common law.

At first blush the distinction which the State seeks to draw based upon whether or not the disputed lands are littoral to the

coast or inland waters seems not implausible. Moreover, it is certainly true that in sketching the historical evolution of the choice of law question, the Court noted that *Hughes* was premised on the international character of the sea which lapped the tideland. *California ex rel. State Lands Commission v. United States*, 102 S. Ct. at 2437. Nevertheless, California's distinction cannot stand, for as the Court noted, the international character of the ocean was but one of many premises which may require displacement of state law. The question, as the Court noted, is not whether the lands are coastal but whether there is any "principle of federal law requiring state law to be displaced." *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371 (1977), *quoted in California ex rel. State Lands Commission v. United States* at 102 S.Ct. at 2437. To this question *California ex rel. State Lands Commission v. United States* supplied the answer. Federal law applies to determinations of title "where the [United States] government has never parted with title and its interest in the property continues." *Id.* Nonetheless, California can and does argue that while this interest requires application of federal law, it cannot be the determining factor as to whether in applying federal law it should adopt the state law as the rule of decision. To so hold, it argues, would mean that *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) was wrongly decided. Yet it notes such a proposition is not even remotely suggested in *California ex rel. State Lands Commission v. United States*.

In *Wilson* an inland water was in issue rather than tideland. Moreover, in *Wilson* the riparian owner was the United States. Under these circumstances the Court found that federal law must be applied but nonetheless it found no impediment to incorporating the state's definitions of avulsion and accretion as the federal rule of decision. From all this, California concludes that *California ex rel. State Lands Commission v. United States* is limited to tidelands cases and as to inland waters this court should proceed to apply the three pronged *Wilson* test and as a result thereof apply California law.

Certainly it is true that a factual distinction between *Wilson* (where state law was incorporated as the rule of decision) and *California ex rel. State Lands Commission v. United States*

(where federal common applied) is that the latter dealt with tidelands and the former with inland waters. Nonetheless, it does not appear to this court that the Supreme Court in *California ex rel. State Lands Commission v. United States* recognized this as a factual distinction of any consequence, or relied upon it as a way of distingushing that case from *Wilson.* On the contrary, the Court seemed to disregard such a distinction observing that, "[f]or over one hundred years it has been settled under federal law that the right to future accretions is an inherent and essential attribute of the littoral or riparian owner." *California ex rel. State Lands Commission v. United States,* 102 S.Ct. at 2439. Significantly in this regard the Court cited, among other cases, two Supreme Court cases which dealt with inland waters—*St. Clair County v. Lovingston,* 23 Wall 46 (1874) (Mississippi River) and *Jefferis v. East Omaha Land Co.,* 134 U.S. 178 (1890) (Missouri River). Thus it may be concluded that the federal common law of accretions is equally applicable to coastal and inland waters.

If, then, federal principles of choice of law require application of federal law to title questions involving land held by the United States, and if the location of the waters is not the basis for determining whether state or federal common law principles supplies the rules of decision, the question remains—what distinguishes *Wilson* from *California ex rel. State Lands Commission v. United States*? It appears to this court that there are several legally significant distinctions. First and foremost, of course, is that in *California ex rel. State Lands Commission v. United States* as here, Congress has spoken. (*See* Section II A, *supra.*) A second distinction is found in the nature of the legal questions at issue in those two cases.

In *Wilson* the Court indicated that there was no need to fashion "a uniform national rule to determine whether changes in the course of a river affecting riparian land owned or possessed by the United States . . . have been avulsive or accretive." 442 U.S. at 673. That is, the issue being considered there was "the rules that will identify and distinguish between avulsions and accretions." *Id.* In *California ex rel. State Lands Commission v. United States,* however, as in the instant case, the issue is not what rules will distinguish avulsions from accretions (relictions) but, rather,

what affect such changes, once identified, will have upon title. It is the latter issue, tendered in *California ex rel. State Lands Commission v. United States* (and here), which requires application of a uniform federal rule. That is to say, title to federal property is a federal interest sufficiently great that only a federal rule may apply. Put another way, state law may not be applied to directly divest the United States of title. "We hold the true principle to be this, that whenever the question in any court, State of federal, is *whether* a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 at 377, *quoting Wilcox v. Jackson*, 13 Pet. 498, 517 (emphasis is added by the *Corvallis* court). On the other hand, the issue to be resolved in *Wilson* (how to determine whether a change was avulsive or accretive), was not directly determinative of title. Rather, it was an intermediate legal issue and thus arguably one of those questions appropriate for borrowing from state law to fill "intersticial" gaps in federal law. *See DelCostello v. Teamsters*, ___ U.S. ___, 76 L.Ed.2d 476, 485 n.13 (1983).[12] Such intermediate questions, while they may bear on resolution of questions of title, are not directly capable of divesting the federal government of its title. *See Wilson*, 442 U.S. at 673.

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[12] I recognize that in *DelCostello* the Supreme Court was considering the "interstitial gaps" created in federal law by congressional enactment and was thus presented with a somewhat different problem. Nonetheless, since *Erie v. Tomkins*, 304 U.S. 64 (1938), the "instances [for application of federal common law] are 'few and restricted'." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), *quoted* in *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 640 (1981). By virtue of this limited scope of federal common law, the instances in which the courts engage in the process of its development also tend to be limited. Thus the federal common law, since it is declared in fits and starts, also has developed "intersticial gaps." The existence of these gaps must be filled as cases present themselves to be resolved; such issues appeal equally to resolution by resort to state law when state law is not in conflict with federal interests.

I conclude, then, that a second basis of harmonizing the results in *Wilson* and *California ex rel. State Lands Commission v. United States* is an examination of the question tendered. Where title to property of the United States is directly in question, not only must federal law govern, but federal common law supplies the rule of decision. For questions subsidiary to title itself, and where non-hostile state law can fill a gap in the federal law, state law may supply the rule of decision.

The above formulation also suggests a third distinction between *Wilson* and *California ex rel. State Lands Commission v. United States*—namely the existence of a gap. The question tendered in *California ex rel. State Lands Commission v. United States* (the ownership of accreted lands) was well settled under federal common law. The Court described the doctrine as settled under federal common law "for over one hundred years." *California ex rel. State Lands Commission v. United States* at 102 S.Ct. at 2439. As to the matter of whether or not changes are avulsive or accretive, the issue considered in *Wilson*, the Court seemed to suggest that such a determination would require the fashioning of a federal common law, *i.e.*, that the law was not already in place. As the Ninth Circuit recently described the situation, "[a]lthough the court found federal common law controlling, it refused to promulgate a general federal common law rule of accretion and avulsion." *United States v. Harvey*, 661 F.2d 767, 770 (9th Cir. 1981).[13] Thus the existence of a federal common law in *California ex rel. State Lands Commission v. United States*, was a factor militating in favor of its application, while the need to fashion federal common law principles concerning a

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[13] The Supreme Court described the decision below as "[r]eviewing *what it perceived to be* the federal common law of accretion and avulsion. . . ." *Wilson*, 442 U.S. at 662. Later the Court observed that "The Court of Appeals, noting the existence of a body of federal law necessarily developed by this Court in the course of adjudicating boundary disputes, . . . purported to find in those doctrines the legal standards to apply . . . in this case . . . The federal law applied . . . however, does not necessarily furnish the appropriate rules to govern in this case." 442 U.S. at 672.

subsidiary issue in *Wilson* suggested that resort to state law was not unwarranted.[14]

C. Summary

I conclude that *California ex rel. State Lands Commission v. United States* and *Wilson* are fully harmonious. Moreover, this case is indistinguishable in any meaningful fashion from the issues resolved in *California ex rel. State Lands Commission v. United States.* Accordingly, under binding precedent, federal law applies in resolution of this matter, and federal law provides the source of the federal rule of decision.[15]

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[14] It is not clear that the Ninth Circuit considers the existence of a well established federal common law a significant factor in resolving rules of decision issues. In a recent case relating to the Miller Act, the Court recognized "that there is no question that federal law governs actions brought under the Miller Act." Nonetheless, it observed that "for resolving a given issue, the court *may* look to state law 'as a matter of convenience and practicality.' " It then reversed the district court for failing to treat the "may" as a must and applying state law inconsistent with the existing federal common law. *See United States for the Use of United Electric Corporation v. National Bonding,* ____ F.2d ____, Nos. 82-4365, 82-4380, slip op. at 3153 n.2 (9th Cir. May 10, 1983). I am uncertain as to what legal principle is to be derived from *National Bonding.* Nonetheless the court takes comfort in the fact that the circuit was addressing the problem in the context of the Miller Act and thus *National Bonding* may have no application to the instant issue. In any event, given that this court's harmonizing of *Wilson* and *California ex rel. State Lands Commission v. United States* also rests on the nature of the issue tendered, and the existence of an applicable federal statute, *National Bonding* would not appear to compel a different result.

[15] Indeed, even if *California ex rel. State Lands Commission v. United States* did not compel this result, it is not apparent that it would be proper in the instant case to borrow California's rule. California's rule provides that, where man made conditions have created the reliction, and the boundaries of state lands are in question, the accretions become the property of the state. Thus in every instance of a dispute between the United States and the state over artificially created relictions the state would prevail. Such a rule is hardly the kind of "even handed" rule which would permit application of state law as a rule of decision. *Wilson,*

II
RELICTION AND TITLE

The United States asserts that the land in issue is relicted and desires this court to declare that under federal common law, relicted lands belong to the upland owner. I turn first to the state of the record.

The State of California argues that there is an inadequate factual basis to determine whether the land is relicted in that such a determination involves both the rate of exposure and its perceptability. *See* n.1, and *see* Report of Special Master Charles Fahy in *State of Utah v. United States,* filed March 19, 1974.[16] The sole evidence as to the speed of the water's recession is to be found in the Task Force report (one to two feet per year). There appears to be no evidence before the court as to the perceptability of the recession. Even though California has declined to state whether the lands in issue are relicted, the United States cannot prevail on this record. Before an opposing party is required to come forward with evidence, the moving party must establish facts sufficient to show "that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). Here, because there is no evidence on the crucial issue of perception, the court cannot find a sufficient factual basis to determine whether the lands in issue are relicted. Accordingly, that portion of the Government's motion must be denied. Nonetheless, for the reasons explained below, I

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442 U.S. at 673. Indeed it appears to this court that it is more than arguable that such a rule is hostile to the interests of the United States. Moreover, the State recognizes that its rule is essentially unique throughout the states. Under such circumstances it also appears that the California rule should not be borrowed. "Although state law may be borrowed if appropriate, 'specific aberrant or hostile state rules do not provide appropriate standards for federal law.' " *North Dakota v. United States,* ____ U.S. ____, 103 S.Ct. 1095, 1105 (1983), *quoting United States v. Little Lake Misere Land Co.,* 412 U.S. 580, 596 (1973).

[16] A subsequent report of the Master is to be found at 1976 Utah Law Review 246. Unfortunately the report cited in text apparently has not been published anywhere. A copy was filed in this case by the Sierra Club and judges of this circuit may obtain copies through the Ninth Circuit Library.

believe it proper for the court to resolve at this stage of the proceedings the purely legal question of who has title to relicted lands under federal common law.

As has been observed "[s]ubdivisions (a) and (b) of Rule 56 authorize a motion for summary judgment 'upon all or any part' of a claim by a claimant or a defending party. In addition, Rule 56(d) deals with the situation in which a motion does not lead to a judgment on the entire case but only terminates further contest as to a portion of the litigation." 10A Wright, Miller & Kane, *Federal Practice and Procedure,* § 2736 at 446 (2d ed. 1983). The entire purpose of partial adjudications is to expedite litigation. *E.I. Du Pont De NeMours & Co. v. U.S. Camo Corp.,* 19 F.R.D. 495 (D.C. Mo. 1956). "An order under Rule 56(d) narrows the issues, enables the parties to recognize more fully their rights and yet permits the court to make one complete adjudication on all aspects of the case when the proper time arrives." *Woods v. Mertes,* 9 F.R.D. 318, 320 (D.C. Del. 1949). "Inasmuch as it narrows the scope of the trial, an order under Rule 56(d) has been compared to a pretrial order under Rule 16." 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2737 at 459. Under these . . . ***Copy Missing*** . . .

Property 15.26 (A.J. Casner Ed. 1952).[17] Because accretions are much more common than reliction, most of the cases that are considered by both parties are accretion cases.

The federal rule relating to accretions is clear and of ancient character. As the Supreme Court observed "For over 100 years it

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[17] The parties apparently do not recognize the irony of ascertaining the federal common law rule that accretions and relictions are treated similarly by resort to state law. *See Oregon v. Corvallis Sand & Gravel,* 429 U.S. 363, 380 n.8 distinguishing between the term "common law" in its "generic sense" and federal common law. It is comforting to note that there are indeed federal cases that also recognize that the two processes as legally synonomous. *See, e.g., Walton v. United States,* 415 F.2d 121, 124 (10th Cir. 1969); *James v. Langford,* 701 F.2d 123, 126 (10th Cir. 1983); *Uhlorn v. U.S. Gypsum Co.,* 366 F.2d 211, 218 (8th Cir. 1966); *Humble Oil & Refining Co. v. Sun Oil Co.,* 191 F.2d 705, 715 (5th Cir. 1951).

has been settled under federal law that the right to future accretions is an inherent and essential attribute of the littoral or riparian owner. [citations omitted] 'Almost all jurists and legislators—both ancient and modern, have agreed that, the owner of the land thus bounded is entitled to these additions.' [citation omitted]" *California ex rel. State Lands Commission v. United States,* 102 S.Ct. 2432, 2439 (1982). As the Ninth Circuit observed "Under the federal and common law rule, land formed by a process of accretion, or gradual deposition of soil upon the shore of an upland bounded by water, belongs to the upland owner." *United States v. Aranson,* 696 F.2d 654, 659 (9th Cir. 1983). Indeed, in dictum the Ninth Circuit has specifically recognized that under the federal law, such is the rule of reliction. "Under the general application of this doctrine, land which becomes exposed by the gradual recession of water belongs 'to the riparian owner from whose shore or bank the water has receded . . .' [citations omitted]." *United States v. Ruby Company,* 588 F.2d 697, 701 n.4 (9th Cir. 1978).[18] Clearly, this rule is not restricted solely to tideland waters, but reaches inland waters as well. *See Aranson, supra* (the Colorado River). The court thus finds that under federal common law, relicted land becomes the property of the owner of the lands littoral to the receding body of water.[19]

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[18] Judge Fahy, relying on *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973), also advised the Supreme Court that federal common law provides that the relicted land is the property of the "riparian proprietor of land bounded by a stream." Report of Special Master, p. 11.

[19] The State of California has asked this court to declare what the law of California is as to relicted lands. Because the court has determined the federal common law governs this action, that law is irrelevant to the instant litigation. Accordingly, the court does not see how such a declaration will narrow the issues or otherwise serve any of the salutary purposes of partial adjudication under Rule 56, and declines to do so.

CONCLUSION

The court grants partial adjudication of these issues in this litigation as follows:

1. Federal law provides the rule of decision in this case.

2. Where, by virtue of the process of reliction, lands are exposed which were previously covered by navigable waters, they belong to the riparian owner from whose shore or bank the water has receded.

IT IS SO ORDERED.

DATED: August 31, 1983.

/s/ LAWRENCE K. KARLTON
Lawrence K. Karlton, Chief Judge
United States District Court

Appendix C

United States District Court
Eastern District of California

No. Civil S-80-696 LKK

State of California, ex rel.
State Lands Commission,
Plaintiff,

v.

United States of America, et al,
Defendants.

Findings of Fact and Conclusions of Law

[Filed April 3, 1985]

FINDINGS OF FACT

1. Mono Lake lies immediately east of the Sierra Nevada in eastern California, occupying the lowest portion of the Mono Basin. As of October 1, 1984, the lake covered an area of 68 square miles, or approximately 10 percent of the total basin.

2. Mono Lake is a terminal lake with no outlet, which means that fresh water entering the lake is lost only to evaporation. Small amounts of salts in the fresh water have accumulated in the lake, and have been concentrated by evaporation to make the lake saline.

3. The United States owns a substantial portion of the uplands around the lake.

4. Mono Lake is hydrologically dynamic, i.e., it responds to climatological factors that affect the amount of water stored in the lake. Since 1919 the level of the lake has been generally declining due to a variety of factors.

5. Primarily because it is located in a "closed" basin and lacks an outlet, Mono Lake has experienced constant and sizeable fluctuations in lake levels, both before and after diversions commenced in 1940. At the time of the federal meander survey in 1855-57, the level of the lake was approximately 6407 feet above

mean sea level. In 1919, the lake reached its historic high stand, about 6428 feet. In 1940, the year that diversions commenced, *see* 6, below, the level of the lake was approximately 6417 feet. In 1981, the lake reached its historic low stand, 6372 feet. By early 1984, the lake had returned to an elevation of approximately 6381 feet, and today it stands at approximately 6380 feet.

6. Since 1940 the City of Los Angeles has diverted water from Mono Basin for municipal use. Water is diverted from Lee Vining Creek, Walker Creek, Parker Creek, and Rush Creek. These diversions have increased since 1971 when the "second barrel" of the Los Angeles aqueduct came into operation, and since then have averaged 92,500 acre-feet per year, as compared to 56,900 acre-feet per year average for the period 1941-1970. Since the diversions began in 1940, the lowest level reached by the lake was 6372.00 feet in December, 1981.

7. Prior to 1940, the lake fluctuated over a range of 24 feet (from 6404 feet to 6428 feet). After 1940, the lake has fluctuated over a range of 46 feet (from 6372 feet to 6418 feet). Although from time to time the fluctuation of the lake has remained within a relatively small range for periods of several years, the lake has never stabilized. At no time has the lake attained what can be described as a "typical" or "normal" water level.

8. The court incorporates herein the undisputed statement of facts prepared by the parties.

9. The level of Mono Lake under natural conditions represents a balance between inflows (streamflow, groundwater and precipitation) and outflow (evaporation). Levels fluctuate in response to daily, seasonal, and cyclical variations in inflow and evaporation.

10. The highest annual lake levels occur usually in late spring and the lowest level tends to occur about November, the end of the period of highest summer evaporation and minimum streamflow.

11. The lake level fluctuates about one-half to three-quarters of a foot annually as a result of these natural, seasonal fluctua-

tions, but may fluctuate at a substantially greater or lesser amount.

12. Daily changes in lake level range from a decline of 0.02 feet to an increase of 0.016 feet per day for 90% of the changes during the period 1940-1984. For this period, 0.02 feet, the maximum decline at the 90% level, is almost precisely the amount of the diurnal variation due to evaporation on a hot summer day at Mono Lake -0.22 inches (.334 inches x .66), or 0.018 feet.

13. Since 1978, runoff in Mono Basin has averaged 130% of mean runoff over the years since 1934. As a result, the rate of decline of the water level at Mono Lake lessened and, since 1981, the lake has risen more than 8 feet due to above normal precipitation, resulting primarily in higher runoff from the melting snowpack, and greatly reduced diversions by the City of Los Angeles.

14. The physical dimensions of Mono Lake are shown in the following table:

PHYSICAL DIMENSIONS OF MONO LAKE

Date	Elevation, feet, MSL, USGS datum	Surface Area, acres	Volume million acre-feet	Length miles	Width miles
Present Lake					
Oct. 1, 1984	6380.15	43,000	2.45	12.5	8.75
Highest Recorded					
July 18, 1919	6428.07	56,700	5.0	13.5	9.5
Lowest Recorded					
December 17 and 30, 1981	6372.00	36,700	2.1	11.75	8.25

15. During the past 3500 years the surface of Mono Lake has fluctuated in irregular cycles of roughly 200 years over a vertical range of more than 130 feet in response to variations in climate and, since 1940, diversions by Los Angeles. The maximum lake level of record was 6428.07 feet in July 1919. The water level as of September 26, 1984, was 6380.15 feet m.s.l. During the past 2000 years, under natural conditions, the lake has dropped below 6380 feet m.s.l. four times, and has fallen to 6370 feet or below three times. Thus, the present level of the lake is within the range of fluctuations seen in the recent geologic past.

16. Mono Lake is apparently in that part of the cycle which, but for the diversions by the City of Los Angeles, would result in higher lake levels.

17. The lake will continue to fluctuate in level due to seasonal and climatic variations, with diversions by the City of Los Angeles being a major controlling factor in future lake levels.

18. Assuming a continuation of the past climatic conditions and a diversion of 100,000 acre-feet per year by Los Angeles, the lake would stabilize in the year 2147 at an elevation of 6336 feet, some 112 feet above the measured deepest point of Mono Lake. At that point the lake would occupy an area of 40 square miles.

19. Although there has been a general and significant decline of 37 feet in the level of Mono Lake since the diversions by the City of Los Angeles began in 1940, there has been little difference in the rate of movement of the Lake level when compared with pre-1940 rates. Both before and after 1940, 90% of the decline of lake levels within a month were 0.4 feet or less; within a week they were 0.12 feet or less.

20. Nonetheless, after the diversions began the amount of decline was greater. For each year that the lake declined in comparison with the previous year, the average amount of decline through 1940 was about 0.8 feet per year; after 1940 the amount of decline increased to an average of 1.6 feet per year. Taking into consideration both declines and increases, after 1940 the change in lake levels amounted to an average decline of about 0.84 feet per year.

21. Similarly, 90% of the daily negative elevation changes since 1940 have been 0.02, or less, feet.

22. Two significant declines since the high stand of 1919 have resulted in exposure of land around Mono Lake. The first decline, from 1919 to 1935, was caused by drought. The second, from 1945 to 1981, was caused primarily by diversions of streamflow to Los Angeles. Climatological factors contributed to the later decline in the sense that the diversions took place during a period of significantly below-average precipitation during many of those years.

23. Perceptibility of change in lake levels is dependent upon a number of factors. The amount and rate of change in the level of Mono Lake in relation to the slope of the shore zone where the change in water level is occurring is one significant factor; the flatter the slope, the greater the horizontal movement of the water's edge with a change in level. Other factors include the entire setting in which the observation of movement would be made and the presence of an easily recognized, stationary and distinctive mark at the shoreline, and the nature of the edge of the shore, whether straight and even or irregular and discontinuous.

24. The slope of the land surrounding and underlying Mono Lake may be depicted in a number of ways including contour maps depicting the slope of the exposed lands (topographic maps) and of the bed of the lake (bathymetric maps). A further depiction may be obtained from slopes calculated from profiles selected at various locations around Mono Lake.

25. The gentlest slopes in the Mono Basin associated with the lake occur between elevation 6385 and elevation 6368 on the lakebed. Below that elevation, the bed of the lake steepens into its depths. Accordingly, the rates of shoreline migration that have occurred with fluctuations in the water level since 1972, when the water level fell below 6385 feet, are larger than those which would occur above 6385 feet or below 6368 feet.

26. A representative set of 26 land surface profiles, plus one profile depicting the steepest slopes and one of the shallowest was developed for trial. The representative set was selected systematically by locating points on the shoreline (6372.67) to intervals of 6000 feet beginning at an arbitrarily chosen point on the south shore. Twenty-two profiles were located on the mainland shore, and an additional four on the Pahoa shore. The location of the representative set and an additional 12 profiles placed by the State to measure only the flattest slopes it could indentify are shown on Court Exhibit (CE) 8, also shown as fig. II-8 in CE 2a.

27. For purposes of describing the physical attributes of a natural object, a representative series of measurements may be used.

a. In this instance, the slope conditions at Mono Lake were depicted by use of a representative set of 26 profiles which provided, at least in a gross sense, a statistical representation of the slopes over the entire range of water movement that has occurred at Mono Lake since statehood in 1850, including the high stand of the lake in 1919 at 6428.07 feet.

b. Slopes may be described in terms of their gradient, the rate of ascent or descent. The parties have chosen to state gradient in number of feet of descent per one thousand feet, and have calculated a gradient for the distance between each contour. The method of calculation used by the court appointed expert, by measuring the amount of gradient per horizontal distance of 1000 feet is an accepted engineering method.

28. Gradients of all of the segments of the representative set, profiles 1-26 (excluding the steepest and flattest profiles 27 and 28) range from 0.8 feet/1000 to 733 feet/1000, and averages 76 feet/1000.

29. The State selected certain slopes which showed some of the gentlest slopes. Although the State used a method different from the court appointed expert's for calculation, it was neither arbitrary nor capricious.

30. In general, land surface gradients on the western shore of Mono Lake are steeper than those on the eastern shore. The average gradient of western profiles is about 65 feet/1000 and of eastern profiles about 21 feet/1000.

31. The apparent rate of migration of the lake shoreline caused by a change in lake level can be calculated if the lake change and the beach slope are known. A lake level change of 0.02 feet/day for post-1940 conditions encompasses 90% of all of the daily declines since 1940. The shoreline migration rate is 0.30 feet per day for the steeper, west side of Mono Lake, and 0.32 feet per day for the gentler, east side. A shoreline migration rate of 0.31 feet per day for the west side of Mono Lake and of 1.389 feet per day for the east side is representative of shoreline exposure rates.

32. The average person, in a position to observe shoreline migrations at Mono Lake, would not have observed the movement of the shoreline as it was occurring.

33. The parties have agreed that the meander line, as surveyed by Von Schmidt in 1856-57, is the best evidence of the location of the ordinary high water mark at the time of Statehood in 1850, and is found generally at approximately elevation 6407 feet m.s.l.

34. The occurrence of upland vegetation close to the present shoreline of a body of water is an aid to a surveyor in determining the location of the present ordinary high water mark, which separates the bed of the lake from uplands.

35. There is vegetation along the west and southwest shore of Mono Lake. There is virtually no vegetation, however, along 60-70% of the shoreline of Mono Lake at the water's edge. This unvegetated area includes uninterrupted miles along the north and east shores of the lake. The only continuous vegetation line around the Lake is at the historic high stand of the lake, 6428 feet above sea level.

36. The absence of vegetation is in part due to the highly alkaline and saline soils on the exposed lake bed. As to some of the area, as much as 70 years may be required to leach the soils. Much of the areas near the water's edge that are vegetated result from fresh water springs and seeps that more rapidly leach the soils.

37. Other physical indicia used by surveyors for determining an ordinary high water mark are topographic features that have been impressed as a result of a water body's constant presence. These indicia include erosional features such as shelves or benches, or depositional features such as berms.

38. A surveyor can use beach features other than those created by standstills in identifying a OHWM.

39. The process of revegetation in some areas can occur on the exposed land in as short a period of time as one calendar year from the time the lands are exposed by the receding water. Upland vegetation at Mono Lake has at places reestablished itself

within one year's time. The vegetation is permanent and is self-reproducing unless it is inundated by rising water. The rising water over the past two years has reinundated areas heavily revegetated since becoming exposed in 1978-1981, creating at places a sharp demarcation between the uplands with terrestrial vegetation and the bed along the shore at Mono Lake.

40. Both vegetation and soil tests are applied by surveyors in ascertaining the present location of an ordinary high water mark (OHWM). Where the presence of salts, rocks, or other physical conditions make the determination of the OHWM impractical at a particular location, surveyors will extend a line between readily observable OHWM locations by a plane which parallels the water surface. On a river, this line would parallel the grade of the river; on a lake, the surface of the lake.

41. Seasonal and daily changes in the water level do not result in a change in the OHWM because such changes are not sufficiently permanent to permit development of the physical indicia of an OHMW based on vegetation changes and beach features.

42. Where water levels decline, as they had at Mono Lake until 1981, depending on soil and water conditions, vegetation gradually colonizes the newly exposed bed of the lake. Where the water levels are rising, encroachment of the water onto vegetated areas kills the vegetation.

43. At Mono Lake, beach berms and other shoreline features that can be used by a surveyor to locate an OHWM become better developed during periods of a relative stillstand of the lake. The longer the stillstand, the better developed are the beach features. The lake has been at a stillstand several times during the past 65 years, during which well developed beach features were formed. These periods occurred from 1917 to 1924, 1939 to 1948, 1951 to 1953, 1965 to 1971 and, most recently, from 1977 to 1982.

44. Given the methods accepted in the field, a surveyor using standard techniques could locate the present OHWM.

45. The hydrology and shoreline migration between Mono Lake and Great Salt Lake are profoundly different.

46. The most significant difference between the Great Salt Lake and Mono lake is in the comparison of shoreline migration rates. Shoreline changes at Great Salt Lake average 15.3 feet/day (based on an average lake level change of 0.058 feet/month and average gradient of 0.126 feet/1000 feet). By contrast, during the period 1940-1980, slope migration rates at Mono Lake averaged only 0.31 feet/day on the west side of the lake and 1.389 feet/day on the east side, only 2% and 9% respectively of the migration rate at Great Salt Lake.

CONCLUSIONS OF LAW

1. This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1346(f). Venue in this court is proper pursuant to 28 U.S.C. § 1402(d).

2. At the time of statehood, California became the owner of the bed of Mono Lake below its ordinary high water mark.

3. Since statehood, the United States has owned a substantial portion of the land upward from the boundary which existed at statehood.

4. Each party to this quiet title action has the burden of establishing its affirmative claim of title. Accordingly, California has the burden of establishing that the boundary relocated above its statehood positon; the United States has the burden of establishing that the boundary between state and federal lands is below its statehood location.

5. The term "reliction" refers to the gradual and imperceptible uncovering of land by the lowering of water rather than sudden or seasonal exposure of the land. *California, ex rel. State Lands Commission v. United States*, (E.D. Cal., Sept. 1, 1983) (Order granting partial adjudication); *see United States v. Ruby Co.*, 588 F.2d 697, 701 (9th Cir. 1978); 93 C.J.S. Waters Sec. 78.

6. Under long-established federal law, lands formed through the process of reliction, whatever its cause, belong to the upland owner as an inherent and essential attribute of ownership. *California ex rel. State Lands Comm. v. United States*, 457 U.S. 273, 278, 284, 285, 288 (1982); *Hughes v. Washington*, 389 U.S. 280,

293 (1967); *Jones v. Johnston*, 18 How 150, 156-58 (1856); *County of St. Clair v. Lovingston*, 23 Wall. 46, 66-68 (1874); *Jefferis v. East Omaha Land Co.*, 134 U.S. 189-93 (1974); *United States v. Aranson*, 606 F.2d 654, 659 (9th Cir. 1983); *Beaver v. United States*, 350 F.2d 4, 10-11 (9th Cir. 1975); *United States v. Ruby Co.*, 588 F.2d 697, 701 n.4 (9th Cir. 1978).

7. An avulsion occurs when a physical change to the boundary formed by a watercourse occurs suddenly and abruptly. *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912).

8. There is no "gray area"—a change is either avulsive or accretive; however, there may be a failure of proof as to whether a change is of one character or another. There is no such failure of proof in the instant case.

9. Perceptability does not depend upon whether a person was likely to be at a place when the change occurred but, rather, the characteristics of the change to be seen if a person was at a place where the change was occurring.

10. Analysis of the perceptibility of the changes in water level at Mono Lake for purposes of determining whether the lands are relicted must discount those changes attributable to daily evaporation and seasonal fluctuations.

11. The common law rule, adopted by the courts of the United States, is that only when the change in the water is sudden, or violent, and visible, does title remain unchanged. "It is not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. 'The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.' *St. Clair County v. Lovington*, 23 Wall. 46, 67, 23 L.Ed. 59, 63, 64." *Philadelphia Co. v. Stimson*, 223 U.S. 605, 624 (1912); *The King v. Lord Yarborough*, 107 Eng. Rep. 668 (K.B. 1824).

12. The federal common law doctrine of reliction applies to lakes. *Banks v. Ogden*, 2 Wall, 69 U.S. 57 (1865).

13. The doctrine of reliction controls at Mono Lake in respect to the boundary lines between the State and the United States. *See, California v. United States,* 457 U.S. 273 (1982).

14. In determining that the exposure has been gradual and imperceptible within the meaning of the common law doctrine, this court relied upon the "faculties of average humanity engaged in the transactions of everyday life," and has evaluated the evidence in that light. *Attorney-General v. M'Carthy,* 2 I.R. 260, 296 (1911).

15. It is presumed that the boundary changes gradually and imperceptibly by operation of the process of reliction, not the rapid, easily perceived and sometimes catastrophic shifts of land incident to floods, storms or channel breakthroughs that characterize avulsive moments. *Peterson v. Morton,* 465 F.Supp. 986, 999 (D. Nev. 1979), *vacated in part and remanded on other grounds,* 666 F.2d 361 (9th Cir. 1982); *Pannel v. Earls,* 483 S.W.2d 440, 442 (Ark. 1972); *Murray v. State,* 596 P.2d 805, 815 (Kan. 1979).

16. The presumption that the movement of a water body is by accretion rather than avulsion does not alter the burden of proof. The use of a presumption as evidence to meet a party's burden of proof shifts to the other party the burden of producing evidence to rebut the presumption, but does not shift the burden of persuasion. Fed. R. Evid. 301.

17. The common law doctrine of reliction applies regardless of the amount of land exposed and is not inapplicable because the amount of the reliction, over a period of time, is large. *Attorney-General v. McCarthy,* 2 I.R. 260, 292 (1911).

18. Whether the exposure is the effect of natural or artificial causes makes no difference under the federal common law. *County of St. Clair v. Lovingston,* 90 U.S. (23 Wall.) 46, 66 (1874); *California v. United States, supra,* 457 U.S. at 275; *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313, 327 (1973).

19. While federal common law does not require that the recession of water be for all time, it does require that the movement of water not be due to temporary causes such as occur

during the day or with the seasons. *Philadelphia Co. v. Stimson,* 233 U.S. 605, 624 (1912).

20. The lands exposed by the decline in the elevation of the water of Mono Lake since its high stand in 1919 are relicted lands.

21. An inherent attribute of the doctrines of reliction and accretion is that they operate in a dynamic environment, not a static one. *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313, 326 (1973). The reliction of Mono Lake is not ephemeral or seasonal, having continued, with some reversals, since 1919. It thus qualifies as a sufficiently long-term trend to warrant application of the doctrine of reliction.

22. Under federal law, the boundary, the ordinary high water mark, between upland owners and the state-owned bed moves as lands are exposed with the change in water levels. *California v. United States, supra,* 457 U.S. at 278; *see also Bonelli, supra,* 414 U.S. at 315-16, 318. The right to land exposed by the process of reliction is an inherent and essential attribute of the littoral or riparian owner, regardless of cause. *California, supra,* 457 U.S. at 284; *Hughes v. Washington,* 389 U.S. 290, 293 (1967); *County of St. Clair v. Lovingston,* 23 Wall 46, 68 (1874).

23. Actions of federal officials that are inconsistent with the claim of ownership of the relicted lands by the United States do not provide an independent basis for the State of California to claim title. *See California ex rel. State Lands Commission v. United States,* 457 U.S. 273, 276 n.4 (1982).

24. There is no federal common law requirement that the relative interests of the claimants to the exposed lands be weighed in applying the rule of reliction. *California ex rel. State Lands Commission v. United States,* 457 U.S. 273 (1982).

25. The alleged inaction, acquiescence, or passivity of the United States in the face of the declining elevation of the lake is not pertinent to resolution of the question of title to the exposed lands.

26. Since a principal cause of the recession of the waters of Mono Lake has been the upstream diversions of the City of Los

Angeles authorized by permit issued by the State of California, and the United States has not erected artificial structures for the specific purpose of causing a reliction, it is appropriate to apply the federal common law of reliction. *United States v. Harvey,* 661 F.2d 767, 772 n.7 (1981); *Beaver v. United States,* 350 F.2d 4 (1965). The United States may claim title to the exposed land even if it had significant control over its creation. *California, supra,* 457 U.S. at 275.

27. The recession of Mono Lake does not constitute a "drainage" or reclamation project.

28. The United States owns lands lakeward of its uplands from the meander line to the present ordinary high water mark. Because the boundary is ambulatory in a dynamic hydrologic system, there is no need to precisely locate the OHWM by survey except when land may be conveyed by the United States, at which time it may be necessary to meander the property in order to determine the acreage.

ORDER

The State of California's complaint is dismissed with prejudice. Costs are awarded to the United States. Judgment will be entered accordingly.

IT IS SO ORDERED.

DATED: April 3, 1985

/s/ LAWRENCE K. KARLTON
Lawrence K. Karlton, Chief Judge
United States District Court

Appendix D

United States District Court
Eastern District of California

No. Civil S-80-696 LKK

State of California, ex rel.
State Lands Commission,
Plaintiff,

v.

United States of America, et al.,
Defendants.

ORDER
[Filed May 13, 1985]

On April 3, 1985, the court filed its Findings of Fact and Conclusions of Law in the above-captioned case. Pursuant thereto, on April 4, 1985, Judgment was entered. On April 8, 1985, the court received a letter from the Sierra Club Legal Defense Fund suggesting that the Findings of Fact and Conclusions of Law as they relate to Finding of Fact No. 31, be amended in that it failed to distinguish between various methods of calculating the lake's migration. The court treated the letter as a motion to amend the judgment pursuant to Fed. R. Civ. P. 59(e) and requested the plaintiff and defendant to reply to the motion. Both the United States and the State of California do not oppose the motion and, accordingly, the court now amends Finding of Fact No. 31 to read as follows:

> The apparent rate of migration of the lake shoreline caused by a change in lake level can be calculated if the lake change and the beach slope are known. A lake level change of 0.02 feet/day for post-1940 conditions encompasses 90% of all of the daily declines since 1940. According to the court appointed expert, since 1940 the shoreline migration rate is 0.31 per day for the steeper west side of Mono Lake and 0.32 per day for the gentler, east side. For conditions since 1940, a shoreline migration rate of 0.31 feet per day for the west side of Mono Lake and of 1.389 feet per day for the east side is

more representative of shoreline exposure rates. This latter figure is derived by eliminating steep profile 11 on Negit Island from the average of eastern shore gradiance and deleting the steeper gradiance between 6420 and 6430 feet from the average of eastern shore gradiance.

On April 15, 1985, the court also received a notice of motion and motion to amend the judgment filed by the State of California. The motion seeks to amend the judgment by having the court delete from the order the award of costs to the prevailing party (the United States) and, rather, have the court order that each side bear its own costs. In particular, the State objects to the order if it encompasses payment of expert fees to Dr. Todd.

As to this matter, it was the court's intention to award costs other than the costs relating to Dr. Todd's fees. It was this court's understanding that Dr. Todd's fees were to be shared by the United States and California. To the degree that the order of the court awarding costs included Dr. Todd's fees, the court hereby amends the judgment to exclude fees and costs relating to Dr. Todd's studies and testimony, said fees and costs to be shared equally by the State of California and the United States.

IT IS SO ORDERED.

DATED: May 10, 1985

/s/ LAWRENCE K. KARLTON
Lawrence K. Karlton, Chief Judge
United States District Court

Not for Publication
United States Court of Appeals
for the Ninth Circuit

NO. 85-1965
D.C. NO. C-S-80-696-LKK

State of California, ex rel.
State Lands Commission,
Plaintiff/Appellant,

v.

United States of America,
Donald P. Hodel,* Secretary
of the Interior, et al.,
Defendants/Appellees.

Sierra Club, et al.,
Intervenors.

ORDER
[Filed Jan 30, 1987]

Before: Kennedy, Reinhardt, and Brunetti, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix F

The Submerged Lands Act

§ 1301. Definitions

When used in this subchapter and subchapter II of this chapter—

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles,[1] and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters:

(d) The terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, public and private corporations, and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign: *Provided, however,* That nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interests other than are described herein and in their respective grants from the State, or its predecessor sovereign;

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, Shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

(f) The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;

(g) The term "State" means any State of the Union;

(h) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

§ 1302. Resources seaward of the Continental Shelf

Nothing in this subchapter or subchapter 11 of this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and

seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed.

§ 1303. Amendment, modification, or repeal of other laws

Nothing in this subchapter or subchapter II of this chapter shall be deemed to amend, modify, or repeal the Acts of July 26, 1866 (14 Stat. 251), July 9, 1870 (16 Stat. 217), March 3, 1877 (19 Stat. 377), June 17, 1902 (32 Stat. 388), and December 22, 1944 (58 Stat. 887), and Acts amendatory thereof or supplementary thereto.

§ 1311. Rights of the States

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) Release and relinquishment of title and claims of United States; payment to States of moneys paid under leases

(1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims

of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on May 22, 1953, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

(c) Leases in effect on June 5, 1950

The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: *Provided, however,* That, if oil or gas was not being produced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from May 22, 1953 equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued, such lease: *Provided, however,* That within ninety days from May 22, 1953 (i) the lessee shall pay to the State or its grantee issuing such lease all rents, royalties, and other sums payable between June 5, 1950, and May 22, 1953, under such lease and the laws of the State

issuing or whose grantee issued such lease, except such rents, royalties, and other sums as have been paid to the State, its grantee, the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States and not refunded to the lessee; and (ii) the lessee shall file with the Secretary of the Interior or the Secretary of the Navy and with the State issuing or whose grantee issued such lease, instruments consenting to the payment by the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States to the State or its grantee issuing the lease, of all rents, royalties, and other payments under the control of the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States or the United States which have been paid, under the lease, except such rentals, royalties, and other payments as have also been paid by the lessee to the State or its grantee;

(d) Authority and rights of the United States respecting navigation, flood control and production of power

Nothing in this subchapter or subchapter I of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

(e) Ground and surface waters west of the 98th meridian

Nothing in this subchapter or subchapter I of this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States.

§ 1312. Seaward boundaries of States

The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant

from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

§ 1313. Exceptions from confirmation and establishment of States' title, power and rights

There is excepted from the operation of section 1311 of this title—

(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude.

§ 1314. Rights and powers retained by the United States; purchase of natural resources; condemnation of lands

(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.

§ 1315. Rights acquired under laws of the United States unaffected

Nothing contained in this subchapter or subchapter I of this chapter shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this subchapter or subchapter I of this chapter and such rights, if any, shall be governed by the law in effect at the time they may have been acquired: *Provided, however,* That nothing contained in this subchapter or subchapter I of this chapter is intended or shall be construed as a finding, interpretation, or construction by the Congress that the law under which such rights may be claimed in fact or in law applies to the lands subject to this subchapter or

subchapter I of this chapter, or authorizes or compels the granting of such rights in such lands, and that the determination of the applicability or effect of such law shall be unaffected by anything contained in this subchapter or subchapter I of this chapter.

No. 86-1729

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

STATE OF CALIFORNIA, *ex rel.* STATE LANDS COMMISSION,
Petitioner,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS-INTERVENORS, SIERRA CLUB and NATURAL RESOURCES DEFENSE COUNCIL

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QUESTIONS PRESENTED

(1) Whether the federal common law of reliction must be applied, as between the United States and the State of California, to determine the ownership of lands exposed as a result of recession of Mono Lake;

(2) Whether the recession was relictive within the meaning of the common law requirement that it be imperceptible in its progress.

RULE 28.1 LISTING

There are no parent companies, subsidiaries, or affiliates to list.

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No. 86-1729

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS-INTERVENORS, SIERRA CLUB and NATURAL RESOURCES DEFENSE COUNCIL

STATEMENT OF THE CASE

The intervenors concur in the Statement of Facts of the United States, but wish to supplement that statement. Mono Lake reached its historic high stand in 1919 (6428 feet) and since that date has generally declined. C.R. # 108, ¶ 5. In 1940 the Lake's elevation was 6417 feet. Ct. Ex. 2-A at 76-77. This eleven foot decline from the 1919 historic high stand was solely attributable to natural causes. C.R. # 108, ¶ 22. The decline since 1940 is attributable primarily to upstream diversions by the City of Los

Angeles but is, in part, attributable to natural causes. C.R. # 108, ¶ 22.[1]

Congress has recognized substantial and continuing federal interests in the littoral uplands at Mono Lake. When in 1931 Congress withdrew the public lands surrounding and adjacent to Mono Lake from entry under the public land laws, Pub. Law No. 864, 46 Stat. 1530, it provided in § 2 of that Act that nothing "shall be construed as affecting the use or occupation of the withdrawn lands for recreational or grazing purposes under such rules and regulations as the Secretary of Interior may deem necessary to conserve the natural forage resources of the area."[2] The historic recreational uses of those lands in the Mono Basin consisted of hunting, swimming, and boating, and depended upon access to the Lake across the federal littoral uplands.[3] Congress

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[1] The State claims, Petition at 4, that "[t]he lake's decline is therefore wholly attributable to diversions from the Mono Basin." This statement is untrue both in respect to its decline since the historic high stand of 1919 and since 1941, the date of commencement of the diversions. The trial court found that:

> Two significant declines since the high stand of 1919 have resulted in exposure of land around Mono Lake. The first decline, from 1919 to 1935, was caused by drought. The second, from 1945 to 1981, was caused primarily by diversions of streamflow to Los Angeles. Climatological factors contributed to the later decline in the sense that the diversions took place during a period of significantly below-average precipitation during many of those years.

C.R. # 108, ¶ 22.

[2] Section 2 of the Act was added to the bill by the Senate Committee on Public Lands and Surveys in order "*to protect and safeguard the Federal* as well as the city's *interests.*" S.R. No. 1726, February 17, 1931, 71st Cong., 3d Sess., at 6 (emphasis added), quoting a Memorandum from Acting Commissioner Havell of the General Land Office to the Secretary of Interior dated February 13, 1931.

[3] *See City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 52 P.2d 585, 587 (1935).

thus intended to preserve federal jurisdiction over these uplands to assure that water-related recreational uses would continue.[4]

In 1984, Congress reaffirmed the longstanding federal interests in the withdrawn lands around Mono Lake by designating, in Title III of Public Law 98-425, 98 Stat. 1619, the Mono Basin National Forest Scenic Area.[5] Section 304(b)(1) charges the

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[4] The legislative history of the Act makes clear congressional intent to preserve existing recreational uses and federal control over the lands in the Mono Basin. *See* statements of Senator Hiram Johnson, 74 Cong. Rec. 6952 (1931) and Congressman Swing, 74 Cong. Rec. 2802, 2806, 2807, 2810 (1931). Prior to its consideration of the bill which became the Act of 1931, Congress had taken up a bill to authorize the Secretary of the Interior to *sell* the lands in the Mono Basin and Owens Valley to Los Angeles, thereby divesting the federal government of all interest in the lands. *Hearings before Senate Committee on Public Lands and Surveys, H. R. 11969*, 71st Cong., 3d Sess. (February 5 and 6, 1931), p. 96. However, the Congressional representatives of the people who lived in Mono and Inyo Counties argued that it was not good policy to allow Los Angeles to acquire title and take the lands out of their existing grazing, mineral, and recreational uses. These objections led to the rewriting of the legislation to provide for withdrawal, instead of sale. *Id.*, pp. 96-7, 99, 100, 102, 103 (Statement of Rep. William Evans of Glendale, sponsor of H. R. 11969 in the House). This assured that federal jurisdiction would be maintained, and that the lands could continue to be used for recreational and grazing purposes.

[5] Respondents do not assert that Title III expresses a specific congressional purpose to reserve the relictions to federal uplands around Mono Lake, but rather that the Act reaffirms the extensive federal interests in those uplands. The House of Representatives passed H.R. 1437, comprising Titles I, II and III of the California Wilderness Act of 1984, on April 12, 1984. 98 Stat. 1638. The Senate passed H.R. 1437, with amendments to Titles I and II, on August 9, 1984. *Id.* On September 12, 1984, the House reconsidered the bill as amended by the Senate. Representative Lehman of California stated that the language of Title III was to be "entirely neutral" on the resolution of the controversy over ownership of the bed, and that Title III was not "intended to have any effect on the pending litigation." 1984 Cong. Rec. 9431 (1984).

Representative Lehman's remarks do not purport to qualify the federal upland interests which Congress specifically reaffirmed by

Secretary with managing the Scenic Area to protect its geologic, ecologic, and cultural resources. The Secretary is required to provide for recreational use of the Scenic Area as well as for scientific study and research. *Id.* Under Section 304(e) the Secretary is to formulate a detailed and comprehensive management plan, which shall provide for hunting and fishing (including commercial brine shrimp operations) within the Scenic Area. Section 304(j) provides that "[e]xisting community recreational uses, as of the date of enactment of this title, shall be permitted at the levels and locations customarily exercised."[6] Section 307 provides that the Secretary shall insure nonexclusive access to Scenic Area lands by Indian people for traditional cultural and religious purposes, including the harvest of the brine fly larvae.[7] Section 304(g)(1) withdraws all the federal lands within the

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designating the Mono Basin National Forest Scenic Area. Moreover, these remarks should not be given binding interpretive effect even as regards a putative House view on the pending litigation. Representative Lehman did not express his views until *after* the House had concluded debate and assented to the provisions of Title III. *A fortiori*, the remarks cannot reasonably govern this Court's construction of the intent of the Senate, which had no opportunity to affirm or disavow the view expressed by Representative Lehman. *See Department of Air Force v. Rose*, 425 U.S. 352, 365-66 (1976) (endorsing *Vaughan v. Rosen*, 523 F.2d 1136, 1142-43 (D.C. Cir. 1975), which declined to give binding interpretive effect to remarks made during one house's passage without amendment of a bill which the other house had already passed); *United Mine Workers, Etc. v. Federal Mine, Etc.*, 671 F.2d 615, 622 (D.C. Cir. 1982); *Jordan v. United States Dept. of Justice*, 591 F.2d 753, 768-69 (D.C. Cir. 1978); *Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982).

[6] This provision continues into present law the intent of the 1931 act that historical grazing and recreational uses be continued.

[7] Brine Fly (*Ephydra hians*) larvae are found in tens of thousands at the lake's edge, at the shoreline. If the United States is not deemed to own the exposed lands adjacent to the water, it can neither insure access by Indian peoples to the shoreline for the brine fly harvest, pursuant to Section 307, nor provide for access to the Lake for hunting or fishing (including commercial brine shrimp operations), pursuant to Section 304(e).

Scenic Area from entry under the mining laws, mineral leasing laws, and the Geothermal Steam Act of 1970.

REASONS FOR DENYING THE WRIT

I. FEDERAL COMMON LAW MUST BE APPLIED AS THE RULE OF DECISION IN THIS CASE

A. The Submerged Lands Act Requires Application of a Uniform Federal Rule of Accretion to Determine Title to Lands of the United States Riparian or Littoral to Navigable Bodies of Water

The Submerged Lands Act, 43 U.S.C. §§ 1301-1315, requires a federal rule of decision here. In *California ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1982), this Court based its holding that the federal common law of accretion must supply the rule of decision, as between the United States as upland owner and the State of California as owner of land below tidelands, on the premise that in the Submerged Lands Act, "Congress has addressed the issue of accretions to federal land." 457 U.S. at 283. Section 5 of the Act, 43 U.S.C. § 1313(a), withheld all "accretions" to lands acquired or retained by the United States from the confirmation in the states of title to lands below navigable waters.[8]

The withholding of accretions to federal uplands from the confirmation of title in the States to submerged lands provides a firm basis for the application here, as in *California ex rel. State*

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[8] 43 U.S.C. § 1313(a) reserves from the confirmation of title to the states in all lands below navigable waters accretions to "all lands which the United States lawfully holds under the law of the State . . . ." 43 U.S.C. §§ 1301(a)(1) defines the term "lands beneath navigable waters" as including:

> all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction . . . .

Lands Commission, of the federal common law of accretion. That in this case lands formerly submerged below inland waters are involved does not distinguish this case from *California ex rel. State Lands Commission*. The State argues, Petition at 13-15, that the Submerged Lands Act only confirmed its preexisting title to lands below inland navigable waters and was not intended to supply a uniform federal rule of decision for accretions to federally owned uplands adjacent to inland waters. That contention is unsupported by the legislative history of the Act.

In *United States v. California*, 332 U.S. 19, 30 (1947), this Court affirmed title in the United States to land underlying the Pacific Ocean off the coast of California. In the course of its opinion, the Court, per Justice Black, stated that California had "*qualified* ownership of lands under *inland* navigable waters." 332 U.S. at 30 (emphasis added). When Congress enacted the Submerged Lands Act, supra, in 1953, it noted its concern that *United States v. California* cast doubt upon the states' long-established title to lands underlying inland navigable waterways within their own boundaries.[9]

In enacting the Submerged Lands Act, Congress declared its purpose, *inter alia*, to establish the titles of the respective states to lands underlying *inland* navigable waterways within their boundaries.[10] The Submerged Lands Act's establishment of state title

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[9] "State officials from every inland State in the Union, except three, testified or submitted statements that in their opinion the decision had clouded the long-asserted titles of the inland States to lands and natural resources below navigable waters within the boundaries of the inland States." H.R. Rep. No. 1778, 80th Cong., 2d Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 1425. *See also* S. Rep. No. 133, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 1480; 99 Cong. Rec. 2693 (remarks of Sen. Cordon); 99 Cong. Rec. 2750 (remarks of Sen. Holland).

[10] "The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past—that the States shall own . . . all lands under navigable waters within their territorial jurisdiction, whether inland or seaward. . . . " S. Rep. No. 133, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 1481. "Title II merely fixes as the law of the land that which, throughout our history

was not unqualified. Congress was careful to provide that the boundaries of federally owned upland would change as necessary in order to maintain contiguity with rivers and lakes.[11] In particular, Congress expressly provided in Section 5(a) of the Act, 43 U.S.C. § 1313(a), that accretions to *federally* owned uplands should accrue to the United States. During debate on the bill, Sen. Cordon explained, "The purpose of the language is to reserve to the United States those facilities and those areas which are used by the Government in its governmental capacity for one or more of its governmental purposes."[12]

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prior to the Supreme Court decision in the California case in 1947, was generally believed and accepted to be the law of the land; namely, that the respective States are the sovereign owners of the land beneath navigable waters within their boundaries. . . . The areas affected by title II include lands beneath navigable inland waters, such as lakes, . . . rivers, ports, harbors, bays, etc. . . . . " H.R. Rep. No. 695, 82d Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 1399 (footnotes omitted).

[11] The final version of the bill passed by the Congress included an amendment to the definition of "lands beneath navigable waters" which specified that these lands were to extend "up to the ordinary high water mark *as heretofore or hereafter modified by accretion, erosion, and reliction.*" S. Rep. No. 133, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 1487 (discussing Submerged Lands Act, ch. 65, Title 1, sec. 2(a)(1) (codified at 43 U.S.C. 1301(a)(1) (emphasis added)). The Senate Committee on Interior and Insular Affairs explained that the committee's purpose was to ensure that the "nontidal or inland areas, title to which is legislatively recognized as being in the States, should not be limited to the submerged lands beneath inland navigable waters as they existed at the time statehood was acquired. The new language would recognize the changes that have taken place since admission." *Id.* at 1492. During debate on the bill, Sen. Cordon explained that the definition was amended "in order to take care of a movement from one side of a channel to another, or erosion on one side and build-up or reliction on the other side." 99 Cong. Rec. 2630.

[12] 99 Cong. Rec. 2619. *See also* 99 Cong. Rec. 2699 (remarks of Sen. Cordon).

Congress intended that the Act's reservation of accretions to federal uplands be broadly interpreted and uniformly applied. No legislative intent to distinguish between naturally and artificially caused accretions or relictions is evident in the ordinary meaning of the plain language of the Act or in its legislative history.[13] Since, according to Congress, the Act "treats all of the States alike, both inland and coastal, with respect to lands beneath navigable waters within their respective boundaries,"[14] application of idiosyncratic state law definitions of accretion and reliction enabling a few states to retain title to exposed lakebeds would frustrate the purpose expressed by Congress in the Submerged Lands Act to reserve title to accretions and relictions to federal uplands for governmental purposes.

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[13] The Senate Committee on Interior and Insular Affairs explained that within the meaning of the Act, " '[r]eliction' refers to lands that once were submerged but have become uncovered, either by the land rising or the waters receding." S. Rep. No. 133, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 1493. The common law rule is that "accretions, *regardless of cause*, accrue to the upland owner." *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 285 (1982) (emphasis added). The Senate Committee's definition of reliction makes no distinction between artificially and naturally caused relictions.

[14] S. Rep. No. 133, 83rd Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 1480. The Act makes no distinction between inland and coastal waters with respect to application of the rules of accretion. In a concurring opinion in *California ex rel. State Land Comm'n*, Justice Rehnquist, joined by Justice Stevens and Justice O'Connor, noted:

> [T]he *Wilson* rule applies to oceanfront property as well as river-front property where the Federal Government is the littoral owner. *Wilson* should apply to the movement of the high-water mark along the ocean in a fashion similar to the way it applies to changes in the bed of a navigable stream. In the instant case, as in *Wilson*, it is irrelevant that the accretion, as a geographical "fact," formed on land within the State's dominion, be it a river bottom or the ocean tidelands.

457 U.S. at 289-90 (Rehnquist, J., concurring).

Section 5 of the Submerged Lands Act thus declares the intent of Congress to have federal uplands governed uniformly by the ancient common law rule of accretion, which existed at the time of California's admission as a state and which vests title to accreted lands in the upland owner. *See California ex rel. State Lands Commission v. U.S.*, 457 U.S. at 284 (referring to the federal law of accretion as having been "settled" for over one hundred years).[15] The declaration of Section 5 is dispositive for purposes of choosing a federal rule of decision, for it expresses a congressional policy to treat accretions and relictions to federal uplands uniformly in title disputes between the states and the federal government. By reserving accretions and relictions, Congress intended that in disputes between the United States and the States, federal common law as to accretion, erosion, and reliction should govern.

A uniform federal rule of accretion is necessitated by the substantial amount of federally owned uplands which have value by reason of their contiguity to navigable waters.[16] Application of California law to this case would create a band of state land around Mono Lake, separating the United States owned uplands from the water.[17] Unless accretions or relictions to federal uplands

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[15] Referring to the Submerged Lands Act in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 324 (1973), this Court stated: "The Act did not abrogate the federal law of accretion, but defined lands beneath navigable waters as being those covered by streams as 'hereafter modified by accretion, erosion, and reliction.'"

[16] According to the report, Public Land Statistics, U.S. Department of Interior, Bureau of Land Management, 1971, p.3, there are a total of 2,263,587,200 acres of public land (*exclusive of national forests and parks*) and 50,090,880 acres of inland waters, including lakes, reservoirs, streams, sloughs, and estuaries associated with such lands. The report does not tabulate the number of acres of riparian and/or littoral federally owned uplands.

[17] In any such state owned band, mineral development and production could occur adjacent to the Mono Lake Scenic Recreation Area. The relicted lands have substantial mineral value, C.R. # 91, ¶ 102. If, however, under the federal law of accretion, the lands are within the Scenic Area because title to them is in the federal government, no

are deemed to belong to the United States as owner of the uplands, water-dependent recreational, as well as grazing and other uses of federal lands, would be impaired.[18]

B. There Is Ancient Common Law Doctrine, Applied Many Times by the Federal Courts For The Last 150 Years, Which Is Settled And Appropriately Applied to Determine Whether A Reliction Has Taken Place

The balancing test prescribed in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), does not apply where there exists a well-settled federal rule of decision relevant to the particular matter in issue. In *Wilson*, the question was "[w]hether to adopt state law or to *fashion* a nationwide federal rule." 442 U.S. at 672 (emphasis added). There, the absence of an extant federal standard and the consequent need to "fashion" one were essential prerequisites to the applicability of the balancing test.

In *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, (8th Cir. 1978), *rev'd*, 442 U.S. 653 (1979), the court of appeals applied federal common law to determine whether sudden and perceptible shifts of the thalweg which did not leave identifiable land in place constituted avulsion. 575 F.2d at 634. *See Wilson*, 442 U.S. at 663 n.12. The court, pointing out uncertainties in the federal common law of avulsion on this question, noted that some decisions required only impetuosity, 575 F.2d at 634-35 (discussing *St. Louis v. Rutz*, 138 U.S. 226 (1891)), while others also required identifiability, *id.* at 635 (discussing *Nebraska v. Iowa*, 143 U.S. 359 (1892)). These federal precedents give rise to two conflicting lines of authority. *See* 575 F.2d at 635-37 (contrasting Nebraska decisions with several federal cases adhering to the impetuosity rationale). *See also Wilson*, 442 U.S. at 663 n.12.

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mineral development could occur. *See* Section 304(g)(1) of Public Law 98-425.

[18] For example, in the Boundary Waters Canoe Area Wilderness Act of 1978, Pub.L. No. 95-495, 92 Stat. 1649, Congress reserved federal riparian and littoral lands for recreational boating uses that would be impaired if title to federal uplands did not follow the water boundary.

Nevertheless, the court of appeals discerned a coherent federal common law standard, and ruled that identifiability was not a prerequisite for avulsion. 575 F.2d at 637. In reversing the court of appeals, this Court described the disposition by the court below as "[r]eviewing *what it perceived to be* the federal common law of accretion and avulsion . . . with no more than passing reference to Nebraska law on the issue." *Wilson*, 442 U.S. at 662 (emphasis added). This Court found the court of appeals "in error for *arriving at* a federal standard, independent of state law, to determine whether there had been an avulsion or an accretion." *Id.* at 678-79 (emphasis added).

Unlike the dispute in *Wilson*, there is no need to "arrive at" or "fashion" a federal rule of decision here. The federal common law of accretion and reliction applicable to the facts of this case is clear and unambiguous. Where accretion or reliction occurs, regardless of cause, title to the accreted or exposed lands vests in the upland owner. *California ex rel. State Lands Comm'n v. United States*, 457 U.S. at 284-85 (1982). Where, as here, there exists a readily discernible and certain federal rule of decision relevant to a matter governed by federal law, there is no need to balance governmental interests because the necessity to either "adopt or fashion" a rule of decision does not arise.

Had the shifting of the river channel in *Wilson* necessitated application of long-settled rules of accretion rather than an unresolved election between alternative definitions of an avulsion, *see Wilson, supra*, 442 U.S. at 663, n.12, federal common law would have been the rule of decision, because there is an established federal common law of accretion, and the Submerged Lands Act requires application of a uniform federal rule of accretion. In *California, ex rel. State Lands Commission v. United States*, referring to the federal common law of accretion as "settled", this Court reaffirmed the principle that "accretions, regardless of cause, accrue to the upland owner," 457 U.S. at 284-285, and stated:

> Moreover, this is not a case in which federal common law must be *created*. For over one hundred years it has been settled under federal law that the right to future accretions is an inherent and essential attribute of the littoral or riparian

> owner. *New Orleans v. United States*, 10 Pet. 662, 717 (1836); *County of St. Clair v. Lovingston*, 23 Wall. 46, 68 (1874). "Almost all jurists and legislators, both ancient and modern, have agreed that the owner of the land thus bounded is entitled to these additions." *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 189 (1890), quoting *Banks v. Ogden*, 2 Wall. 57, 67 (1865).

457 U.S. at 284.

Since Roman times, the law of alluvion has been applied to the same problem presented by this case—whether changes in land exposure arising from changes in the level of a body of water over time are accretive or avulsive.[19] The critical inquiry in determin-

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[19] In recognition of the fact of nature that over time any boundary formed by a watercourse will ambulate, the English common law describes four types of physical changes to water boundaries—accretion, reliction, erosion, and avulsion. F. Clark, The Law of Surveying and Boundaries, § 566-74 (4th ed. 1976). The first three describe changes that are gradual. Avulsion occurs when a physical change to the boundary formed by a watercourse occurs suddenly and abruptly. *Id.* at § 572. *See Philadelphia v. Stimson*, 223 U.S. 605, 624 (1912). *See also* Halsbury, *Laws of England* (4th Ed.), Waters § 294-300.

When accretion, reliction, or erosion occurs, the title to the land follows the watercourse. Under the common law rule, land formed by a gradual deposition of soil upon the shore of an upland owner bounded by water belongs to the upland owner. *United States v. Aranson*, 696 F.2d 654, 659 (9th Cir. 1983). Land which becomes exposed by the gradual recession of water belongs to the riparian owner from whose shore or bank the water has receded. *United States v. Ruby Co.*, 588 F.2d 697, 701 n.4 (9th Cir. 1978). The law of accretion and reliction is identical. "Reliction" and "accretion" are terms used interchangeably, and their legal effects on the upland property owner are identical. *Bear v. United States*, 611 F. Supp. 589, 593 (1985). In contrast, an avulsive change results in no change of land ownership. 3 *American Law of Property*, 15.26-.27 (A.J. Casner ed. 1952).

There are three identifiable policy considerations underlying the doctrine of accretion-reliction. *See generally Alluvio and the Common Law*, 99 Law Quarterly Review 412 (1983); Lundquist, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion*, 14

ing the legal consequences to boundaries formed by ambulatory watercourses is whether the change occurred gradually and imperceptibly, or whether the change was sudden and abrupt. In *County of St. Clair v. Lovingston,* 90 U.S. 46 (1974), this Court determined, under the law of alluvion, ownership of certain lands that had been created in the harbor of the City of St. Louis by the Missouri River. After discussing the ancient Roman and common law of accretion, 90 U.S. at 66-67, this court stated:

> In the light of the authorities alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. *The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference.* The result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property.

Arizona L.R. 315 at 322-24 (1972); and *Bonelli Cattle Co. v. Arizona,* 414 U.S. at 326-27 (1973). The first and foremost consideration is that since the adjacent riparian owner bears the risk of loss of property through gradual physical changes to boundaries formed by watercourses (erosion), the adjacent riparian owner should also benefit from the addition of property by accretion or reliction. *County of St. Clair v. Lovingston,* 90 U.S. 46, 69 (1874). A second policy is that the riparian owner's access to adjacent water should be protected. *Hughes v. State of Washington,* 389 U.S. 290, 293-94 (1967). "By requiring that the upland owner suffer the burden of erosion and by giving him the benefit of accretions, riparianness is maintained." *Bonelli,* 414 U.S. at 326. The third policy consideration is based on the governmental interest in providing reliably ascertainable boundaries. *Purvine v. Hathaway,* 393 P.2d 181, 183 (Ore. 1964). These considerations do not dictate the application of identical legal consequences for avulsive changes since avulsions are rare, often temporary, and in the case of a sudden change in a river channel, one upland owner still has access to the water. *See Nebraska v. Iowa,* 143 U.S. 359 (1891).

90 U.S. at 68-69 (emphasis added). Since similar issues are presented by this case, application of the well-settled doctrine of accretion is warranted.

II. THE WELL-SETTLED RULES OF THE LAW OF ACCRETION ARE APPLICABLE TO LAKES UNDER THE FACTS OF THIS CASE

This venerable common law doctrine is applicable to artificially induced recessions of inland lakes, notwithstanding the contention of the State that the federal common law of reliction has not been applied to inland lakes under the circumstances of this case. Petition at 20-21. This Court applied the doctrine of accretion to a freshwater lake, Lake Michigan, in *Banks v. Ogden*, 69 U.S. 57 (1864). There the Court described the doctrine of accretion as governing additions made to land bounded by a river, lake, or sea, and concluded: "There is no question in this case that the accretion from Lake Michigan belongs to the proprietor of land bounded by the lake." 69 U.S. at 67. *See also Jones v. Johnston*, 59 U.S. 150 (1859) (accretion due to artificial causes on Lake Michigan belongs to upland owner). In *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 at 189 (1890), this Court, citing *Banks v. Ogden*, restated the applicability of the law of accretion to lakes.

A. There is No Exception to the Common Law Rule of Reliction Where Lakes Are Uncovered Intentionally or "Drained"

Petitioner asserts that courts will not apply the reliction doctrine where lakes are uncovered intentionally or drained. Petition at 19-22. This statement is based upon what is, at best, a minority state view, not reflected in any federal case. The majority of cases hold otherwise. In *Heise v. Village of Pewaukee*, 285 N.W.2d 859, 864 (Wis. 1979), the court applied the reliction rule to a lake where exposure of land was caused by a reclamation project. *See also De Simone v. Kramer*, 252 N.W.2d 653, 657 (Wis. 1977). In *State Engineer v. Cowles Brothers Inc.*, 478 P.2d 159 (Nev. 1970), the Nevada Supreme Court applied the reliction doctrine to award title to a *dry lake bed* to the upland owners as against the State of Nevada. The lake had dried up due to an increased

withdrawal of waters from the Truckee River for irrigation purposes.

Even if Petitioner is correct in its contention that there is a "drainage" exception to the common law rule, no "drainage" has taken place at Mono Lake. Almost one-sixth of the total acreage of lakebed exposed to date was exposed from 1919 to 1940, when the upstream diversions commenced. Between 1919 and 1940, Mono Lake fluctuated over a range of 11 feet. CE-2A, p. 76, Figure IV-10A. This 11 foot recession was entirely due to natural conditions. C.R. #108, ¶¶ 17, 22. Clearly, all lands exposed prior to 1940 were not exposed by a "drainage."[20] The so-called "drainage" exception is plainly inapposite to those lands exposed between 1919 and 1940.[21]

Moreover, in licensing the upstream diversions of the feeder streams for the benefit of the City of Los Angeles, the State of California was certainly not acting in furtherance of commerce and navigation on the Lake itself by engaging in a reclamation or drainage project.[22] In fact, the Lake will not be "drained" as a result of the upstream diversions, for, "assuming a continuation of the past climactic conditions and a diversion of 100,000 acre feet

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[20] Over 2,000 acres were exposed between 1919 and 1940. CE-2A, p. 69, Table IV-5. At the date of judgment in the trial court, a total of 14,000 acres of former lakebed lands had been exposed. C.R. #108, ¶ 14. Even the recession since 1940 has in some part been attributable to significantly below average precipitation. C.R. #108, ¶ 22.

[21] Even under the rule of decision urged by the State, the United States would have title to the band of lakebed that was exposed from 1919-1940. Under the State's drainage rule, however, lands exposed after 1941 would belong to the State. Under other circumstances, as where artificial exposure preceded natural recession, this could lead to the absurd result that federally owned uplands would not be contiguous to federally owned relictions.

[22] A "drainage, as applied to land, contemplates removal of water by artificial channel or trench." Words and Phrases, *Drainage*. A "drainage" implies a conveyance of water away from a lake or river. No water is being conveyed out of Mono Lake. The diversions occur upstream in some of its feeder streams.

per year by Los Angeles, the Lake would stabilize in the year 2147 at an elevation of 6336 feet, some 112 feet above the measured deepest point of Mono Lake." C.R. 108, ¶ 18. At that point the Lake would still occupy an area of 40 square miles. *Id.*

The few cases cited by Petitioner, at 21, declare minority state rules that have no analog in federal common law.[23] Most of the cases have a common thread—the interests of the state in retaining title to lands purposefully reclaimed by expensive public

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[23] The majority of states continue to apply the common law rule of accretion even where there has been reclamation or a project by the state to improve navigability. *See Heise v. Village of Pewaukee*, (applying common law of reliction in a reclamation situation); *Michaelson v. Silver Beach Improvement Assn*, 173 N.E.2d 273, 277 (Mass. 1961) (accretion doctrine to be applied unless state has undertaken navigation improvement projects pursuant to its navigation powers *and* the project is necessary to accomplish protection of navigation or fisheries); *Pugh Coal Co. v. State of Wisconsin*, 312 N.W.2d 856 (Wisc. 1981); *Lakeside Boating and Bathing, Inc. v. State of Iowa*, 344 N.W.2d 217 (Iowa 1984). In fact, almost all states recognize the common law rule that artificially caused accretions have the same impact upon riparian or littoral title as those caused naturally. *See, e.g., Brundage v. Knox*, 117 N.E. 123 at 128 (Ill. 1917) (holding accretion had occurred although caused by city reclaiming bed of Lake Michigan); *State by Kay v. Sause*, 342 P.2d 803 (Ore. 1959); 63 *A.L.R.3d* 254 *et seq.* ("*Accretion Caused By Artificial Conditions*").

Many of the cases which refuse to apply the reliction doctrine in settings of reclamation, drainage, or harbor or navigable water-way improvement characterize the changes produced by the state project as "sudden." To that extent, the cases are really "avulsion" cases which do not depart from the common law doctrine. Two of the four cases cited by Petitioner to support its contention there is a drainage exception to the reliction doctrine, Petition at 21, are such "avulsion" cases. *See State v. Longyear Holding Co.*, 29 N.W.2d 657 (Minn. 1947) (sudden change in water level); *Garrett v. State of New Jersey*, 289 A.2d 542 (1972) (avulsion); *Noyes v. Collins*, 61 N.W. 250 (Iowa 1894) (disappearance of water suddenly drying up lake completely). These cases may be read alternatively as an expression of the minority rule of *Carpenter v. City of Santa Monica*, 63 Cal. App. 2d 772 (1944), that exposure due to artificial causes does not accrue to the benefit of the upland owner. *See State v. Longyear Holding Co., supra*, 29 N.W.2d at 667.

works projects implemented by the state.[24] Where, as here, no reclamation project or drainage is involved, incorporating into the federal common law of accretion the "drainage" exception (apparently recognized only by Florida) would be improper.[25]

B. Under Federal Common Law, the Cause of An Accretion or Reliction is Immaterial, Unless It Is Caused By the Upland Owner

The situation at Mono Lake is not distinguishable from downstream effects produced by any man-made alteration of a water course, such as a dam. The federal common law rule of accretion has been uniformly applied to recessions caused by man-made alterations of water bodies. The federal common law rule is that the cause of the accretion or reliction is immaterial.[26] The only exception recognized under the federal common law is that "the doctrine of accretion does not extend to land reclaimed by the owner of the adjoining [up]land through filling in land under water and making it dry." *Burns v. Forbes*, 412 F.2d 995, 997 (3rd Cir. 1969). *See also United States v. Harvey*, 661 F.2d 767, 772, n.7 (9th Cir. 1981) (exception from rule when there are "self-employed intentional accretions"). Under federal law the doctrine of accretion *does* extend to confer title on the upland owner when land is uncovered due to the acts of a third party.[27] *Id.* Under the

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[24] It is not the direct intention of Los Angeles to cause a recession of the Lake. That is only a by-product of the diversions.

[25] *Martin v. Busch*, 112 So. 274, 287 (Fla. 1927) and *Padgett v. Central and South Florida Central Dist.*, 178 So.2d. 900, 904 (Fla. App. 1965).

[26] In *Lovingston*, this Court noted: "The proximate cause [of the accretion] was the deposits made by the water. The law looks no further. Whether the flow of the water was natural, or affected by artificial means, is immaterial." 90 U.S. at 69. *See also California ex rel. State Lands Commission*, 457 U.S. at 285; *Beaver v. United States*, 350 F.2d 4, 11 (9th Cir. 1965) ("The erecting of artificial structures does not alter the application of the accretion doctrine. . . . "); *Alexander Hamilton Life Ins. Co. v. Govt. of V.I.*, 757 F.2d 534, 544-545 (8th Cir. 1985).

[27] In *Bonelli*, 414 U.S. at 322-323, this Court stated in dictum: "It would be at odds with the fundamental purpose of the original grant to

facts presented here, the United States neither filled in nor reclaimed land, and in no manner, through its actions, directly caused the recession to occur.

C. There Is No Readily Ascertainable Basis in State Law for Application of An "Intentional Drainage" Rule Under the Facts of this Case

California's posture with respect to the applicability of its law has substantially shifted throughout this litigation. In the trial court, when the district court was determining the choice of law question, the State relied upon *Carpenter v. City of Santa Monica*, 63 Cal. App. 2d 772 (1944). C.R. 26 at 12-16.[28] The State claimed that the *Carpenter* rule confers title on the state when accretion is artificially induced.

Now, faced with this Court's supervening decision in *California ex rel. State Lands Commission*, 457 U.S. at 284, squarely rejecting application of *Carpenter* as a federal rule of decision to determine title to artificially induced accretion on federally owned upland, the State has fashioned a new theory. Instead, the State relies on a statute, Cal. Pub. Res. Code § 7601 (Deering 1976), that it maintains embodies the "common law" exception to the accretion doctrine that when inland lakes are drained for reclama-

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the States to afford a State title to land from which a navigable stream has receded unless the land was exposed as part of a navigational or related public project *of which it was a necessary and integral part* or unless, of course, the artificial accretion was somehow caused by the upland owner himself." *See also* 414 U.S. at 329. Although this dictum conflicts with the Court's earlier statement, 414 U.S. at 327 that "[w]here accretions to riparian land are caused by conditions created by strangers to the land, the upland owner remains the beneficiary thereof," even under this more restrictive test, California cannot prevail here.

[28] In its Memorandum in Support of its Motion for Summary Judgment in the trial court, the State, citing *Carpenter*, argued that "California has created a limited exception to this rule [the common law of accretion] where sovereign land boundaries are concerned by distinguishing between slow and imperceptible changes to the water boundary that are naturally caused and slow and imperceptible changes to such boundary that result from artificial causes." *Id.* at 12.

tion or other purposes, title remains in the state. Pub. Res. Code § 7601 provides:

> Any person desiring to purchase any of the lands uncovered by the recession or drainage of the waters of inland lakes, and inuring to the State by virtue of her sovereignty, shall make an application therefor to the commission. This section shall not affect or apply to any land uncovered by the recession or drainage of the waters of any lake or other body of water, the waters of which are so impregnated with minerals as to be valuable for the purpose of extracting therefrom such minerals.

Pub. Res. Code § 7601 implies a state claim to all lands uncovered by recession or drainage of inland lakes, whether the exposure arises because of an intentional drainage or because of natural causes. Given such broad claims to exposed lake bed lands, the United States, as sovereign owner of uplands, will always lose.[29] To the extent the State relies upon § 7601 as the

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[29] Because of the Equal Footing Doctrine, recognizing title in the states to all lands below inland navigable waters, and the Submerged Lands Act, discussed *supra*, the United States is most commonly an upland owner *vis-a-vis* the states, which are owners of the beds of navigable waters. Although the United States, or an Indian tribe, may on some occasions be the owner of lands submerged below inland waters, *see Utah Div. of State Lands v. United States*, 55 U.S.L.W. 4750 (U.S. June 8, 1987), *reversing* 780 F.2d 1515 (10th Cir. 1985) (reaffirming the presumption against conveyances by the United States of lands beneath navigable waters before a state was admitted in the Union), this will be a rare situation. *See United States v. Aranson*, 696 F.2d 663-66 (9th Cir. 1983). The ownership by the United States of the beds of certain lakes in California, arising from a grant from the State, mentioned in the Petition at 17, n.6, 7, is not indicative of the usual relationship between lands of the United States and the states under the Equal Footing Doctrine. Moreover, under Pub. Res. Code § 7601, only the State as sovereign benefits when the waters recede. California is wrong in its contention that the United States can benefit from § 7601 with respect to lakebeds granted to it by the State since it does not hold such lands by reason of its sovereignty. Petition at 17, n.6, 7. Under § 7601 the United States, like private individuals, can only file "applications" to the State for sale of exposed lakebed.

predicate for a federal rule of decision, that statute expresses a rule completely without any foundation in the common law of accretion.

The State contends it would be inappropriate to apply the common law doctrine of accretion and reliction, otherwise generally recognized by the State. *See* Cal. Civil Code § 1014 (Deering 1971).[30] Rather, it urges this Court to apply as a federal rule of decision the so-called "intentional drainage" exception that awards title to the bed owner when lakes are intentionally drained for reclamation purposes. However, that exception is singularly inappropriate, under the facts of this case, to serve as a federal rule of decision. It is more appropriate to apply the reliction-accretion doctrine, which takes into account changes in water boundaries induced by nonnatural causes. California offers this Court a rule of decision that is predicated solely upon a state statute authorizing applications to purchase exposed lakebed lands. That statue does not express the "intentional drainage" exception offered by California. In fact, the State cites no California authority that recognizes such an exception.[31]

This case thus presents the flip side of the *Wilson* situation. There, the state rule was certain, the federal common law rule unsettled. Here, the federal common law rule is settled, the suggested state rule of decision aberrational, idiosyncratic, and, at best, only inferrable, rather than expressly recognized, from the "authorities" cited by the State. Here, it is the State that is attempting to "fashion" a state rule that would properly serve as

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[30] Civil Code § 1014 provides: "Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank."

[31] *City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 52 P.2d 585 (1935), cited by Petitioner, held only that private littoral owners at Mono Lake were entitled to monetary damages for a taking of their littoral rights of access as a result of the diversions by the city. The court's opinion never discusses, let alone decides, the question of ownership of the exposed lakebed, and did not affirm the award of damages based on loss of title.

the federal rule of decision. What it has fashioned is not appropriate to the facts here presented.

D. Application of A State Rule of Decision Would Injure Federal Interests

Application of the rule of decision urged by the State would make the federal uplands no longer contiguous with the waters of Mono Lake. To apply a state rule of decision would result in creation of a band of state owned land between federal lands withdrawn for recreational and grazing uses and Mono Lake. Application of the federal common law rule of accretion would be consistent with federal interests and promote the intent of Congress in withdrawing the federal uplands in 1931.

III. THE COMMON LAW OF PERCEPTIBILITY IS A RULE OF REASON REQUIRING THAT THE PROCESS OF LAND EXPOSURE NOT BE OBSERVABLE AS IT IS HAPPENING

The State's view of the perceptibility criterion in the federal common-law of accretion-reliction is likewise an aberrant one that has been rejected almost universally. The state argues that in order for a change to be characterized as avulsive, it has only to be observable over a period of time, not perceptible to the ordinary observer as it occurs.

This view of the perceptibility criterion was rejected in *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 (1890). There this Court held that the doctrine of accretion applied to the Missouri River despite the fact that "the river cuts away its banks, sometimes in a large body, and makes for itself a new course, while the earth thus removed is almost simultaneously deposited elsewhere, and new land is formed almost as rapidly as the former bank was carried away." 134 U.S. at 189. This Court applied the doctrine of accretion in this instance although "at intervals of not less than three or more months it could be discerned by the eye that additions greater or less had been made to the shore." 134 U.S. at 192. This Court indicated its agreement with the doctrine of the English cases that "accretion is an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived, and does not admit of the view that, in order to be

accretion, the formation must be one not discernible by comparison at two distinct points of time." 134 U.S. at 193.[32] *See also County of St. Clair v. Lovingston*, 90 U.S. at 68-69.

The classic common law definition of perceptibility formulated by Bracton, *Book II*, Ch. 1, cited with approval in *Jefferis*, 134 U.S. at 192, states:

> Alluvion is a latent increase, and that is said to be added by alluvion, whatever is so added by degrees, that it cannot be perceived at what moment of time it is added; for although you fix your eyesight upon it for a whole day, the infirmity of sight cannot appreciate such subtle increments, as may be seen in the case of a gourd, and such like.

As this Court further noted in *Jefferis*, Bracton's formulation of the test is based upon Justinian, who commented that the addition must be made so slowly "ut intellegere non possis, quantum quoque momento temporis adiciatur." *Id.* at 192 (quoting *Institutes*, 2.1.20). ("One cannot perceive the change (or increment) as it is happening (or being added).")

Petitioner, at 24, cites *Attorney-General v. Reeve*, 1 Times L.R. 675 (1885), for the proposition that there cannot be accretion if the change in a shoreline is apparent over the course of a day or hours. However, in *Reeve* the witnesses testified that the change was perceptible because of certain marks on the ground that enabled them to perceive the course of shoreline change over hours. Thus, *Reeve* holds at best that if change is perceptible because of marks on the ground, accretion has not occurred.

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[32] In *Bonelli Cattle Co.*, this Court signalled a willingness to consider even perceptible changes accretive under some circumstances. This Court stated in *dictum*:

> The [earlier] advance of the Colorado's waters divested the title of the upland owners in favor of the State in order to guarantee full public enjoyment of the watercourse. But, when the water receded from the land, there was no longer a public benefit to be protected; consequently, the State, as sovereign, has no need for title. *That the cause of the recession was artificial, or that the rate was perceptible, should be of no effect.*

414 U.S. at 323-24 (emphasis added).

The English common law courts have declined to follow *Reeve*. The court's reasoning in *Reeve* was exhaustively critiqued by the King's Bench in *Attorney General v. McCarthy*, 2 I.R. 260 (1911). There the Court refused to follow *Reeve* because it was predicated on a misreading of Lord Hale's treatise on the law of the sea and contrary to *Gifford v. Yarborough*, 5 Bing. 163, 2 Bligh (N.S.) 147; 1 Dow and Cl. 178, *sub. nom. Rex v. Lord Yarborough*, 3 B and C 91 (1824), which, as the leading English case on the law of accretion, held that where land is added by a process of recession that is not perceptible in its progress, the owner of the uplands acquires the title, notwithstanding the existence of marks or bounds or other evidence by which the former line of ordinary high water mark can be ascertained. 2 I.R. at 276.[33] *See also State by Kay v. Sause*, 342 P.2d 803, 820 (Ore. 1959) (presence of ascertainable boundaries does not prevent application of rules of accretion, citing *Attorney-General v. McCarthy*).[34]

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[33] The Court characterized *Reeve* as relying upon an "unfortunate dictum" in *Attorney General v. Chambers*, 45 Eng. Rep. 22, 27 (1859), that has had an "unsettling and confusing effect on the administration of the law." 2 I.R. at 289. *See also* a critique of *Chambers* in Halsbury's *Laws of England*, Water, § 298, n.4. Disavowing the holding in *Chambers*, Halsbury maintains that the accretion doctrine applies, "notwithstanding that the former boundaries of the land concerned were defined or ascertainable." *Id.*

[34] Petitioner cites a number of cases for the proposition that courts have found that changes were not gradual and imperceptible even though the changes were not observable as they occurred. Petition at 24. This is a distinctly minority view, if it exists. The cases cited by petitioner do not stand for the asserted proposition. In *McCafferty v. Young*, 397 P.2d 96, 99 (Mont. 1964), the Court appeared to base its finding of avulsion on sudden changes that had occurred when extraordinary flood conditions prevailed in 1918. In *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), the Court, applying Washington law that required a finding of "suddenness", 717 F.2d. at 1262-1263, determined that a rechanneling project of the Corps of Engineers, which had caused a river to change its course, was avulsive. The Court did not base its holding on an interpretation of the common law perceptibility criterion. 717 F.2d at 1263. *People v. William Kent*

Petitioner asks this Court to adopt the reasoning of the Special Master in *Utah v. United States*, 420 U.S. 304 (1975).[35] In *Utah*, the Special Master had to determine the amount of money owed by Utah as a result of a quitclaim deed by the United States purporting to convey its interest in lands exposed by recession of the Great Salt Lake. After the date of the quitclaim deed, a rising trend in lake elevation had brought the Great Salt Lake to within a few inches of its statehood level, reinundating the area which had been exposed after statehood. As of the date of hearing before the Special Master on February 27, 1973, nearly all of the exposed land had been resubmerged. Report at 24.[36] The rapid rise in elevation of the Lake since 1967, the date of the quitclaim deed by the United States, persuaded the Special Master that the "situation had not prior to or on June 15, 1967, reached a state of stability or reasonable permanence." Report at 25.[37] The Special Master then set forth his reasoning in greater detail for deciding that the doctrine of accretion-reliction had no applicability to Great Salt Lake and that title to the exposed lakebed had not vested in the United States as upland owner. He stated:

> The doctrines of accretion and reliction contemplate ambulation in title boundaries; but the valuable features of riparian ownership, particularly those incident to maintaining access to the water, and the compensation theory referred to in *Bonelli, supra*, 414 U.S. at 326, seem to the Special Master to envisage a situation different from the special relation of

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Estate Co., 242 Cal. App. 2d 156, 51 Cal. Rptr. 215 (1966) simply stands for the unremarkable proposition that annually recurrent changes in the exposure of oceanfront beach do not constitute accretion or reliction. Intervenors have discovered no case that applies the doctrine of accretion to such impermanent, seasonal changes.

[35] This was a memorandum decision of the Supreme Court directing the entry of a decree proposed by the Special Master.

[36] The Special Master's Report is not reported.

[37] In contrast with Great Salt Lake, at Mono Lake there has been an unambiguous downward trend in lake elevation since 1919, except during the unusually wet years 1983-1984 and from 1938-1946. CE-2A, Figure IV-10B.

> the waters of the Great Salt Lake to the riparian land. Such a relation seems inconsistent with the stability which should pertain to a change in title by operation of law. In providing for payment by Utah to the United States of such interests as the United States might be found to have conveyed to the State by the quitclaim deed of June 15, 1967, the statute of June 3, 1966 is indicative of a congressional assumption that such payment would be required only if the situation at that date was reasonably permanent in nature rather than temporary, as the history of the Lake has demonstrated it to have been.

Report at pp. 25-26.

The Special Master was construing congressional intent with respect to the consideration for a conveyance and did not believe Congress intended to make the State of Utah pay hundreds of thousands of dollars for the 325,000 acres of exposed lands that were, at the time of the decision, inundated because the lake level had risen nearly to its historical 1870 high mark.[38] *See* Report at 9, 24-26.[39]

By urging this Court to hold that shoreline migration perceptible over the course of hours or a day is not accretive, Petition at 22 *et seq.*, the State refuses to accept the common law rule that only such shoreline migration that is perceptible at the moment it is occurring is avulsive. Under the common law, avulsive changes are rare since they are sudden and dramatic. Petitioner would have such avulsive changes commonplace in Mono Lake, occur-

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[38] The Special Master noted that for 10 days prior to June 15, 1967, the date of the quitclaim deed, the lake level fluctuations inundated or exposed between 10,000 and 20,000 acres with each fluctuation. Report at 18.

[39] In any event, the views of the Special Master concerning the application of the common law perceptibility test to Great Salt Lake are *obiter dicta*, or at best an alternate holding, and are of no precedential value. This Court did *not* adopt the findings, discussion, and conclusions of the Special Master. *See* 420 U.S. at 304. This Court simply directed the entry of the decree proposed by the Special Master, with some modifications agreed to by the parties. *Id.* at 304-06.

ring regularly since upstream diversions commenced in 1941. Such a result turns the common law presumption favoring accretion on its head,[40] and ignores the trial court's finding that no one, including the State's own expert, has observed such shoreline migration as it is occurring.[41] California is thus the proponent of a definition of perceptibility that would reverse a presumption fashioned centuries ago to protect the "vested right" of upland owners to retain "an inherent and essential attribute of the original property." *County of St. Clair v. Lovingston*, 90 U.S. at 68-69.

CONCLUSION

For the foregoing reasons, the State's Petition should be denied.

DATED: June 26, 1987

Respectfully submitted,

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[40] *Peterson v. Morton*, 465 F. Supp. 986, 999 (D. Nev. 1979), *vacated in part and remanded on other grounds*, 666 F.2d 361 (9th Cir. 1982).

[41] R.T. 593-594, 608-609. *See* also C.R. #108, ¶¶ 23, 32.

(3)

No. 86-1729

In the Supreme Court of the United States

OCTOBER TERM, 1987

CALIFORNIA STATE LANDS COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether federal law supplies the rule of decision to determine ownership of lands exposed as a result of shoreline recession at Mono Lake.

2. Whether the court of appeals correctly affirmed the district court's conclusion that the exposed lands at Mono Lake are relicted lands that belong to the United States as the upland owner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 805 F.2d 857. The decisions of the district court (Pet. App. A14-A48) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1986, and a timely petition for rehearing was denied on January 30, 1987 (Pet. App. A49). The petition for a writ of certiorari was filed on April 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Mono Lake is a navigable lake, covering an area of approximately 68 square miles, which lies at the lowest part of the Mono Basin immediately east of the Sierra Nevada in eastern California (Pet. App. A2). Because all

drainage in the basin flows toward the lake and there is no surface or subsurface outlet, water entering the lake is balanced only by evaporation losses from the lake. The lake reached its highest marked level in 1919, and two significant declines since that high stand have resulted in recession of water from the shoreline.[1] This recession has, in turn, resulted in the exposure of a band of previously-submerged land around the lake.

The United States own approximately 70 percent of the uplands surrounding Mono Lake. The federal uplands were retained by the United States when the State of California entered the Union and were withdrawn from the public domain in 1931 in order to preserve the area for recreation and grazing, as well as to protect the watershed. Act of Mar. 4, 1931, ch. 517, 46 Stat. 1530.[2] The State of California owns the submerged lands beneath Mono Lake, as "lands beneath navigable waters within the boundaries" of the State. 43 U.S.C. 1311(a); see also *Shively* v. *Bowlby*, 152 U.S. 1 (1894). This litigation concerns the ownership of the lands exposed by the recession of the shoreline.

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[1] The first decline, from 1919 to 1935, was caused by climatic variation—drought. The second, from 1945 to 1981, was caused primarily by diversions of several of the streams that otherwise would have fed the lake, but also from climatological factors because the diversions took place during a period of significantly below-average precipitation. The stream diversions occurred pursuant to permits issued in 1940, by the State of California to the City of Los Angeles, to help supply the City's water needs. Pet. App. A37.

[2] In 1972, the lake's Negit Island was designated an "Outstanding Natural Area" (37 Fed. Reg. 18224), and, in 1984, the United States Department of the Interior's Bureau of Land Management designated the public lands within the Mono Lake Ecological Area an "Area of Critical Environmental Concern" (49 Fed. Reg. 7664). Congress has also recently indicated the continuing federal interests in the federal lands in the Mono Basin by designating the Mono Basin National Forest Scenic Area in Title III of the California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1632.

2. On August 19, 1980, the State filed this quiet title action against the United States claiming title to the previously-submerged lands. The Sierra Club and the Natural Resources Defense Council intervened on behalf of the United States. The case was litigated in two phases, the first of which concerned whether federal or state law governed and which law supplied the rule of decision in the case (Pet. A2-A3). Following the filing of cross-motions for partial summary judgment, the district court held that federal law both governs the case and supplies the rule of decision. The court concluded that, under federal law, if the exposed lands constitute a reliction, the United States owns the relicted lands (*id.* at A31-A32).[3]

The second phase of the district court litigation was a bench trial to determine whether reliction occurred at Mono Lake. Specifically at issue was whether the recession of water at the lake has been "gradual and imperceptible" (Pet. App. A3).[4] Taking all record evidence into account,

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[3] "Reliction" refers to the gradual and imperceptible recession of a water boundary, leaving exposed land. "Accretion" refers to the gradual and imperceptible accumulation of bits of rock, sand and dirt into new lands, or alluvion, on a shore. The "terms are often used interchangeably, and [the] law relating to accretions applies in all its features to reliction." 3 *American Law of Property* § 15.26, at 855 (A.J. Casner ed. 1952), cited in *Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 387 n.7 (1977) (Marshall, J., dissenting on other grounds). See also *Alexander Hamilton Life Ins. Co.* v. *Gov't of the Virgin Islands*, 757 F.2d 534, 538 (3d Cir. 1985). See discussion of federal rule of ownership of relicted lands, *supra* at 11-14.

[4] Prior to trial and upon agreement of the parties, the court appointed an independent expert, David Keith Todd of David Keith Todd Consulting Engineers, Inc., to present the basic hydrologic and physiographic data pertinent to the litigation. Dr. Todd produced a lengthy multi-volume final report, in which shoreline migration rates were calculated. The State's expert, Scott Stine, also calculated the apparent rate of shoreline migration and testified that even at the lake's flattest slopes, during the summertime when peak evaporation and

the district court found that "[t]he average person, in a position to observe shoreline migration at Mono Lake, would not have observed the movement of the shoreline as it was occurring" (*id.* at A40). Having determined that the disputed lands constitute relicted lands in both law and fact, the court concluded that the United States owns the relicted lands at Mono Lake (*id.* at A46).

3. The court of appeals affirmed. It upheld (Pet. App. A13) both the adoption by the district court of the federal reliction doctrine as the rule of decision and that court's application and construction of the federal rule to the recession at Mono Lake. The court of appeals rejected as misplaced the State's reliance on *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), as requiring adoption of state law. The court explained that (1) borrowing state law is precluded here because Congress has stipulated in Section 5(a) of the Submerged Lands Act (Act), 43 U.S.C. 1313(a), that accretions to federal lands are excepted from that Act's grant to the states of lands beneath navigable waters (Pet. App. A5-A6); and (2) the circumstances present in *Wilson* requiring adoption of a state rule of decision are not present in this case (*id.* at A7-A8). The court also

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diurnal variations affect shoreline migration, he witnessed no shoreline migration during his many days at the lake (Tr. 593-596). Furthermore, he was of the opinion that the average person, in a position to observe shoreline migrations at the lake, would not have observed the movement of the shoreline as it was occurring (Tr. 608-609).

The court also heard testimony from David Blau, on behalf of the United States, on the question of perceptibility of lake level and shoreline change. Mr. Blau analyzed the existing setting, determined the amount of change in water levels that would be appropriate to depict, and then portrayed that change, using photos and computer simulation to compare the appearance of the shoreline after a decline of the water level. In each instance, with a variety of conditions illustrated, it was Mr. Blau's professional opinion that that change in lake level would not be perceptible (Tr. 716-749).

rejected the State's claim "that what it terms 'the intentional uncovering' of a lake presents a novel circumstance within federal law" (*id.* at A9), explaining that (1) "federal law makes no exception for relictions * * * resulting from artificial causes" (*ibid.*); and (2) the State cannot characterize the recession at Mono Lake as an "intentional uncovering" and then claim that ownership questions are resolved by reference to the law of a few other states relating to ownership of land deliberately exposed by reclamation or drainage, because the diversions here were not for any such purpose and the State did not challenge the district court's finding to that effect (*id.* at A9-A10). Finally, the court of appeals determined that the district court correctly applied the reliction doctrine to the shoreline recession at Mono Lake in reaching its conclusion that the recession was gradual and imperceptible and thus constituted a reliction (*id.* at A10-A13).

ARGUMENT

The court of appeals correctly applied settled principles to the facts of this case. The decision does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. Petitioner contends (Pet. 8) that the court of appeals erred in finding the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, and *California ex rel. State Lands Commission* v. *United States*, 457 U.S. 273 (1982) (*State Lands Commission*), relevant to deciding whether state or federal law should supply the rule of decision in this case. Petitioner asserts (Pet. 11) that the choice of law question instead is controlled, in its favor, by *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979). These contentions are incorrect.

a. First, the court of appeals correctly held that federal law supplies the rule of decision here because Congress, in the Submerged Lands Act, has established a

uniform federal statutory directive that governs ownership of the disputed lands in this case. Section 3(a) of the Act provides that "title to and ownership of the lands beneath navigable waters, within the boundaries of the respective States * * * be * * *, *subject to the provisions hereof*, recognized, confirmed, established, and vested in and assigned to the respective States * * *" (43 U.S.C. 1311(a) (emphasis added)).[5] Section 5(a) of the Act, however, excepts "from the operation of Section 1311", and preserves federal title to, "all accretions" attaching to "lands expressly retained by or ceded to the United States when the State entered the Union" (43 U.S.C. 1313(a)).

It hardly needs saying that these provisions, defining the scope of a state's interests, are not subject to unilateral expansion by the affected state. Congress having determined that past and further accretions and relictions are excluded, no state can alter that result. Nor can any state unilaterally increase its interest to include some accretions by applying its own narrower definition of that term. Plainly, this federal statute must be read to treat all states alike, defining the scope of the states' interests in accordance with uniform federal rules.

The court of appeals correctly concluded that this congressional directive is dispositive of the choice of law question in this case, just as this Court found it to be in *State Lands Commission*. *State Lands Commission* concerned title to land created through accretion, due entirely to construction of a jetty, to land owned by the United States on the coast of California. The State urged the Court, as it

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[5] Section 2(a) of the Act defines "lands beneath navigable waters" to mean "all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union * * *, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction" (43 U.S.C. 1301(a)).

does here, to adopt state law as the rule of decision. In rejecting that contention, this Court held: "First, and dispositive in itself, is the fact that Congress has addressed the issue of accretions to federal land" (457 U.S. at 283). The Court explained (457 U.S. at 283-284):

> The Submerged Lands Act, 43 U.S.C. § 1301 *et seq.*, vested title in the States to the lands underlying the territorial sea, which, in California's case, extended three miles seaward from the ordinary low-water line. The Act also confirmed the title of the States to the tidelands up to the line of mean high tide. Section 5(a) of the Act, however, withheld from the grant to the States all "accretions" to coastal lands acquired or reserved by the United States. 43 U.S.C. § 1313(a). In light of this provision, borrowing for federal-law purposes a state rule that would divest federal ownership is foreclosed. In *Wilson*, where we did adopt state law as the federal rule, no special federal concerns, let alone a statutory directive, required a federal common-law rule.

In light of Section 5(a), the Court "appl[ied] the federal rule that accretions, regardless of cause, accrue to the upland owner" (457 U.S. at 285) and ruled that the United States held title to the disputed land (*ibid.*). The same reasoning fully applies here.

Petitioner recognizes "[t]he fact that federal property adjoining inland waters may fit within the literal scope of Section 5(a)" (Pet. 14), but asserts that the Act nonetheless cannot affect the choice of law question in cases involving inland waterways because the Act merely confirmed the States' titles to land underlying inland navigable waters that they had long ago acquired under the equal footing doctrine.[6] This contention seriously misconceives both the

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[6] Under the equal footing doctrine, new states, upon their admission to the Union, acquired title to the lands underlying navigable

effect of the Submerged Lands Act and its relationship to the equal footing doctrine. In *Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) (*Corvallis*), the Court reasoned that "[o]nce the equal-footing doctrine had vested title to the riverbed in Arizona as of the time of its admission to the Union, the force of that doctrine was spent; it did not operate after that date to determine what effect on titles the movement of the river might have" (429 U.S. at 371). The Court in *Corvallis* concluded that "[t]he equal-footing doctrine did not, therefore, provide a basis for federal law to supersede the State's application of its own law * * *, and state law should have been applied *unless there were present some other principle of federal law requiring state law to be displaced*" (*ibid.* (emphasis added)). Here, federal law does require that state law be displaced. The Court in *Corvallis* held that the equal footing doctrine did not convey an ambulatory title, whereas the Submerged Land Act established exactly that in Section 5(a), with regard both to inland and coastal waters, where the water borders federal lands.[7]

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water within their boundaries. See *Utah Division of State Lands* v. *United States*, No. 85-1772 (June 8, 1987), slip op. 1-2; *Shively* v. *Bowlby*, 152 U.S. 1 (1894).

[7] Petitioners also misconstrue (Pet. 14) a statement in our brief to the Court in *State Lands Commission* as expressing agreement with its proposition that the Submerged Lands Act has no application to inland situations. In fact, we made no such assertion. Our statement that "the holding of *Corvallis* * * * recognizes that a state *may*, by local law, retain once submerged lands that the Submerged Lands Act does not embrace" (*ibid.* (emphasis added)) is wholly consistent with our position in this case. The Submerged Lands Act "does not embrace" the question of ownership of accretions to uplands owned by private parties. Thus, a state "may by local law, retain" such lands. The Act does, however, embrace the question of ownership of accretions to federally owned uplands, and the state may not, by local law, retain such once-submerged lands.

b. Nor is petitioner correct in contending that the court of appeals' judgment conflicts with this Court's decision in *Wilson* v. *Omaha Indian Tribe, supra*, and that the reasoning in *Wilson* requires that state law supply the rule of decision here as it did in that case. As the court of appeals (Pet. App. A7-A8) and the district court (*id.* at A26-A27) recognized, the issue in *Wilson* differed significantly from that here.

The choice of law question here is whether ownership of the exposed lands at Mono Lake should be determined by the use of federal law or California law. We have shown that federal law supplies the rule of decision because of Congress's directive in Section 5(a) of the Submerged Lands Act. By contrast, as this Court recognized in *State Lands Commission* (457 U.S. at 278 n.7), *Wilson* was "a case not involving a boundary dispute." The issue before the Court in *Wilson* was not the choice of federal or state law to determine ownership of accreted or relicted lands, but rather, in the Court's own statement of the issue, "whether federal or state law determines whether the critical changes in the course of the Missouri River in this case were accretive or avulsive" (442 U.S. at 658). The Court specifically noted that what constitutes an avulsion differed under federal and state law (*id.* at 663 n.12).

Simply stated, because the Submerged Lands Act does not address that definitional distinction between avulsions and accretions it has no relevance to the choice between federal and state law to provide "the rules that will identify and distinguish between avulsion and accretions" (442 U.S. at 673) at issue in *Wilson*. The Act does, however, address the ownership of accretions to federal uplands, and thus requires application of federal law to ownership of the disputed lands at Mono Lake.[8]

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[8] Even if *Wilson* were otherwise applicable, the choice of California law would still be barred here because "specific aberrant or hostile state rules do not provide appropriate standards for federal law."

United States v. *Little Lake Misere Land Co.*, 412 U.S. 580, 595-596 (1973). Petitioner is wrong in stating that, under California law, "the parties *will not* always occupy the same relative positions, because the United States may own the beds of navigable waters. * * * In California * * *, the United States appears to own the beds of three navigable lakes and could benefit from state law regarding ownership of uncovered lake beds" (Pet. 17 n.6 (emphasis in original)). The United States does own those lake beds, although not because of the application of any general "state law regarding ownership of uncovered lake beds" (*ibid.*), but because of a specific California statute ceding those particular lake beds to the United States. 1905 Cal. Stat. 4. And, specifically, there is no general California law regarding ownership of uncovered lake beds which could benefit the United States. The California law cited by petitioner (Pet. 18 n.7) for the proposition that exposed lake beds continue to belong to the owner of the bed, could benefit *only* the State, and not any other owner of lake beds. That law, Cal. Pub. Res. Code § 7601 (*West* 1977), provides, in part, that "[a]ny person desiring to purchase any of the lands uncovered by the recession or drainage of the waters of the inland lakes, and inuring to the State by virtue of her sovereignty" may apply to purchase such lands. The provision refers only to the purchase of exposed lake beds which inure "to the *State* by virtue of her sovereignty" (emphasis added). Thus, only the State—not the United States or any other lake bed owner—could arguably utilize this provision as evidence of ownership of such exposed lands.

Moreover, the California Statehood Act itself barred the State from impairing the title of the United States to public lands littoral or riparian to navigable waters. See Act of Sept. 9, 1850, ch. 50, § 3, 9 Stat. 452. And petitioner cannot rely on its selective historical assertions in claiming that "federal interests would not be harmed by a state rule" (Pet. 18), because no estoppel was alleged against the United States in the complaint, and any claim based on statements by federal officials who themselves lacked authority to dispose of government property would be frivolous. See *United States* v. *California*, 332 U.S. 19, 40 (1947); see also *State Lands Commission*, 457 U.S. at 276 n.4. In short, the only California law arguably relevant to these circumstances could never operate to benefit the federal government, and such a hostile rule "do[es] not provide appropriate standards for federal law" (*Little Lake Misere Land Co.*, 412 U.S. at 596).

2. Petitioner further contends, incorrectly, that even if federal law does supply the rule of decision, there is no federal rule "to determine ownership of lake beds uncovered by intentional diversions or drainage" (Pet. 19), and that "general common law supports California's retention of the uncovered bed" (*ibid.*) by application of a supposed "drainage rule in which the submerged bed owner retains the uncovered bed" (*id.* at 20). Petitioner presents a novel, but futile, argument that "the intentional uncovering of a lake bed by diversions" (*id.* at 21) does not involve any question concerning reliction and, hence, there is no established federal common law to apply in these circumstances.[9]

At bottom, the State's contention is that the federal reliction rule does not apply to shoreline changes at a lake—rather than a river or the ocean—at least where those changes result from "intentional diversions." To the contrary, the federal rule neither distinguishes between ownership of lands "uncovered" at a lake as opposed to a river or ocean, nor recognizes any distinction in this context between shoreline changes resulting from artificial conditions (*e.g.*, "intentional diversions") as opposed to natural conditions. The established federal rule is that, regardless of whether due to natural or artificial conditions, the upland owner benefits from relicted lands, and, similarly, suffers the loss of land due to erosion:

> For over 100 years it has been settled under federal law that the right of future accretion is an inherent

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[9] The State's contention that the reliction doctrine is not implicated by the shoreline recession at Mono Lake is not without irony. As the district court noted (Pet. App. A14-A15 n.1), the State initially proposed a stipulation that the lands at issue are relicted lands, but then refused to so stipulate when the United States agreed. The State's first suggestion of the theory that the reliction doctrine may have no application here occurred when the State sought reconsideration of the district court's choice of law determination. See Memorandum of the State of California, etc., in Support of Motion for Reconsideration, 20 n.7.

> and essential attribute of the littoral or riparian owner. *New Orleans* v. *United States*, 10 Pet. 662, 717 (1836); *County of St. Clair* v. *Lovingston*, 23 Wall. at 68. " 'Almost all jurists and legislators * * * both ancient and modern, have agreed that the owner of the land thus bounded is entitled to these additions.' " *Jefferis* v. *East Omaha Land Co.*, 134 U.S. at 189, quoting *Banks* v. *Ogden*, 2 Wall. 57, 67 (1865).
>
> * * * * *
>
> Applying the federal rule that accretions, *regardless of cause*, accrue to the upland owner, we conclude that title to the entire disputed land in issue is vested in the United States.

State Lands Commission, 457 U.S. at 284-285 (emphasis added). See also *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 325-327 (1973) (overruled on other grounds). In *State Lands Commission*, the Court referred to this rule as the "long-established federal law" (457 U.S. at 278), "the historic rule" (*id.* at 285), "the long-established federal rule" (*id.* at 286), and "the long-settled rule" (*ibid.*).[10]

This Court has plainly recognized the application of this doctrine to ownership of land exposed by the recession of waters at inland lakes, as well as at rivers, streams, and ocean shoreline. The Court in both *State Lands Commission* (457 U.S. at 278) and *Bonelli* (414 U.S. at 325) cited as authority for its statement of the historic federal rule the case of *Jones* v. *Johnston*, 59 U.S. (18 How.) 150

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[10] Petitioner, too, described this rule to the district court as "[t]he general rule" (Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment, at 11), while urging that the general rule does not apply in California because of the State's "artificial accretion" rule (*id.* at 12). See *State Lands Commission*, 457 U.S. at 284-285 n.12, for a rejection of California's rule for federal law purposes.

(1856), in which the Court applied the doctrine to questions of ownership of land exposed by recession of waters at the shore of Lake Michigan.[11] Drawing on precedents from cases involving shoreline changes at rivers and the sea, the Court stated the same rule more recently described as "the historic rule" (*id.* at 155-156):

> If the call for the southern boundary, instead of being a lake, which is a shifting line, had been a permanent object, such as a street or wall, there could not be two opinions as to the location. And yet the water-line, though it may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as the former. I speak not now of sudden and considerable changes, which are governed by different principles.
>
> * * * * *
>
> Land gained from the sea either by alluvion or dereliction if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining.

Contrary to petitioner's contention (Pet. 20), therefore, there is settled federal law under which the reliction doctrine applies to the circumstances at Mono Lake. Like those in *Jones* v. *Johnston, supra* the diversions here have resulted in the recession of the shoreline and the exposure of previously submerged lands at a lake, and the federal rule regarding ownership of such lands is thus controlling.

The State's contention that a different rule should apply because the shoreline changes at Mono Lake resulted from "intentional diversions" is an attempt to engraft a novel

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[11] The Court explained that the construction of the Chicago harbor had the effect of diverting the Chicago River where it met the lake, resulting in "the recession of the waters to the extent of some twelve hundred feet in width, and for a considerable * * * length northward along the shore." *Id.* at 152. See also *Banks* v. *Ogden,* 69 U.S. (2 Wall.) 57 (1865).

and confusing exception on the federal reliction rule.[12] There is no warrant for the creation of such an exception, which would radically change the law with respect to waterfront boundary disputes. After all, activities affecting navigable waters are commonplace, and many water boundary changes have resulted incidentally from various governmental or private activities which, as here, were undertaken for purposes other than changing the shoreline boundaries. Boundary disputes in such circumstances have historically followed the traditional rules of reliction, accretion, erosion, and avulsion.

3. Finally, petitioner objects to the test employed by the district court for determining that the shoreline migration at Mono Lake was gradual and imperceptible and thus constituted a reliction. The district court based its test directly (Pet. App. A43) on this Court's statement in *Philadelphia Co.* v. *Stimson,* 223 U.S. 605, 624 (1912):

> * * * It is when the change * * * is sudden, or violent, and visible, that title remains the same. It is not enough that the change may be discerned by com-

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[12] There is no relevance here to cases cited (Pet. 21) by petitioner for the proposition that the reliction doctrine does not apply to the intentional uncovering or drainage of a lake. At no time in this lawsuit has petitioner even attempted to demonstrate that the State of California intentionally uncovered a portion of Mono Lake, or intentionally drained Mono Lake, so as to expose lands, nor did the State challenge below the district court's determination (Pet. App. A46) that the diversions do not constitute a drainage or reclamation project. The State, in fact, explicitly asserted to the district court that its purpose in permitting the diversions was not to uncover lands, but was to provide water to Los Angeles:

> *The State's purpose* in allowing the diversion of the waters from Mono Lake *was not to obtain title to the exposed lands,* but * * * to provide domestic water to the people of Los Angeles.

Memorandum of Points and Authorities in Further Support of Plaintiff's Motion for Partial Summary Judgment, etc., at 25 (emphasis added).

> parison at two distinct points of time. It must be perceptible when it takes place. "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process is going on." *County of St. Clair* v. *Lovington, supra,* at 68.

Petitioner objects to the district court's determination that the shoreline change at Mono Lake was gradual and imperceptible by considering whether the change was perceptible "as it was occurring" (Pet. App. 40). Petitioner contends that "no common law court has ever found changes" in shoreline to be gradual and imperceptible that are observable "over 'short term' periods of hours, days, and weeks" (Pet. 22).[13]

Petitioner's assertion is baseless, and plainly warrants no further review. First, it flies directly in the face of this Court's admonition, stated in the test utilized by the district court, that "[i]t is not enough that the change may be discerned by comparsion at two distinct points [in] time" (*Stimson,* 223 U.S. at 624). Petitioner nevertheless offers several cases (Pet. 23-24) that, it asserts, either directly or indirectly support a different viewing period than that set out in *Stimson.* For example, it suggests that a Wisconsin case decided 35 years before *Stimson* evinces its version of the test. But that case has not since been cited in support of such a test even in Wisconsin. Petitioner also

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[13] The State implicitly conceded below that, under the test applied by the district court, there is substantial evidence in the record to support the conclusion that the changes were gradual and imperceptible. No argument was presented in the court of appeals contesting that conclusion under this test. The State summarizes its own version of the evidence in its petition (Pet. 22-23, n.10), as it did in the court of appeals, but presents no argument that the district court's factual findings were in error. Nor could it on this record. See, *e.g., Anderson* v. *City of Bessemer,* 470 U.S. 564 (1985).

cites an English case, *Attorney General* v. *Reeve,* 1 T.L.R. 675 (1885), in which the court appeared to permit comparison of a water boundary at two distinct points in time. However, the position in that case was explicitly later disavowed in *Attorney General* v. *McCarthy,* 2 I.R. 260 (1911), just as it directly conflicted with the earlier English case of *The King* v. *Lord Yarborough,* 107 Eng. Rep. 668 (K.B. 1824). *Lord Yarborough* defined imperceptible "as meaning imperceptible *in its progress*" (*id.* at 674 (emphasis added)).

Petitioner mistakenly also claims support (Pet. 18 n.7) for the proposition that "the uncovering of Mono Lake would not be gradual and imperceptible" in one California case, *People* v. *William Kent Estate Co.,* 242 Cal. App. 2d 156, 51 Cal. Rptr. 215 (1966). *Kent* involved a situation where seasonal increases and decreases in the shoreline occurred regularly each winter and summer in offsetting pairs. The California Court of Appeals stated that, in circumstances like those, such seasonal fluctuations could result in "constantly transferring ownership of the intermediate land" (242 at 160, 51 Cal. Rptr. at 218) if the doctrine of accretion were applied. Consistent with this Court's admonition that such nonpermanent seasonal fluctuations do not cause boundaries to change,[14] the state court concluded that seasonal fluctuations "cannot meet the definitions of natural accretion and deliction" (*ibid.*). *Kent* thus stands for the well-established exception to the accretion doctrine under which that doctrine does not

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[14] This Court has long held that neither cyclic nor continual fluctuation affect application of the doctrine of accretion. See *Alabama* v. *Georgia,* 64 U.S. (23 How.) 505, 515 (1859) ("the bed * * * is that portion * * * which is alternatively covered, and left bare, as there may be an increase or diminution in the [water supply], and which is adequate to contain it at its average and mean stage during the entire year, *without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn*" (emphasis added)).

apply to affect ownership where water boundary changes are cyclical, even if the changes are gradual and imperceptible. The State did not contend on appeal, however, that this exception has any application to the shore boundary at Mono Lake, and did not challenge the district court's conclusion that:

> The reliction of Mono Lake is not ephemeral or seasonal, having continued, with some reversals, since 1919. It thus qualifies as a sufficiently long-term trend to warrant application of the doctrine of reliction.

Pet. App. A45.[15]

The State also relies, mistakenly, on the reports of the Special Master in litigation before this Court involving ownership of lands at the Great Salt Lake in *Utah* v. *United States,* No. 31, Original, as evincing a special reliction test for lakes. See Pet. 24. The second phase of that litigation concerned the question whether the reliction doctrine applied in that case. The Special Master, in his second Report to the Court, determined that, due to a rising trend in lake elevation—which brought the lake to within a few inches of its statehood level as of the date of the hearing before the Special Master—nearly all of the previously exposed lands had been resubmerged. Report of Special Master at 24. The Special Master emphasized that the unique nature of that lake bed "causes a gradual and slight change in the elevation of the lake to result in a much greater alteration of the relation of the water to the

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[15] In fact, California decisions do not compare different points in time to determine whether water boundary changes have been gradual and imperceptible, but are consistent with the rule expressed in *Stimson.* See, *e.g., Miramar Co.* v. *City of Santa Barbara,* 23 Cal. 2d 170, 143 P.2d 1 (1943); *Ward Redwood Co.* v. *Fortain,* 16 Cal. 2d 34, 38-39, 104 P.2d 813, 815-816 (1940); *City of Los Angeles* v. *Anderson,* 206 Cal. 662, 666-667, 275 P. 789, 791 (1929); *Strand Improvement Co.* v. *Long Beach,* 173 Cal. 765, 161 P. 975 (1916).

land" (*id.* at 18). Ultimately, the Special Master concluded that, due to the unique character of the changes at the area, "[t]hese changes *were not* at the date of the quitclaim deed *of such a reasonably permanent or stable character as to warrant application of the [reliction] doctrine*" (*id.* at 32 (emphasis added)). Based on this conclusion, the Special Master proposed a decree to the Court concerning the ownership of the relevant lands (*ibid.*). In short, the Special Master concluded that he could not apply the reliction doctrine to the particular circumstances at the Great Salt Lake because the changes, like those discussed in *Kent,* were not of a reasonably stable basis. Like *Kent*, this Report has no authoritative value at all in the present circumstances, where the disputed lands at Mono Lake are exposed as a result of a long-term recession since the high stand in 1919.[16]

The net result of adopting the State's test would be a shift away from the traditional presumption that boundary changes occur by accretion rather than avulsion (Pet. App. A44), *i.e.,* a presumption that water boundaries are ambulatory unless the change which occurs "is sudden, or violent" and "visible" (*Stimson,* 223 U.S. at 624). This presumption is based on sound and long-established policies underlying the accretion doctrine, which would be frustrated should petitioner's new test be adopted. These policies have been well summarized by this Court in *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. at 326 (overruled on other grounds):

> There are a number of interrelated reasons for the application of the doctrine of accretion. First, where

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[16] Moreover, even if the Report were relevant there, it would be of limited authority. Only the Special Master's proposed decree, with modifications agreed to by the parties, were adopted by the Court. *Utah* v. *United States,* 420 U.S. 304 (1975). The Court did not adopt the opinion, findings of fact, or conclusions of law, in the Special Master's Report.

> lands are bounded by water, it may well be regarded as the expectancy of the riparian owner that they should continue to be so bounded. Second, the quality of being riparian, especially to navigable water, may be the land's "most valuable feature" and is part and parcel of the ownership of the land itself. *Hughes* v. *Washington, supra,* at 293; *Yates* v. *Milwaukee,* 10 Wall. 497, 504 (1871). Riparianness also encompasses the vested right to future alluvion, which is an "essential attribute of the original property." *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 68 (1874). By requiring that the upland owner suffer the burden of erosion and by giving him the benefit of accretions, riparianness is maintained. Finally, there is a compensation theory at work. Riparian land is at the mercy of the wanderings of the river. Since a riparian owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by the accretions thereto which are equally beyond his control. *Ibid.*

By contrast, petitioner offers no policy justification for its novel test, which would result in much more frequent loss of riparian ownership rights.

In sum, under established principles, title to the exposed lands vested in the United States as the reliction occurred. (*State Lands Commission,* 457 U.S. at 278). The court of appeals therefore properly affirmed the district court's determination that title to the disputed lands remains in the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 86-1729

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF CALIFORNIA, EX REL.
STATE LANDS COMMISSION,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

ARGUMENT

I

Mono Lake and the Missouri River are both inland navigable bodies of water. In Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) the federal government, as owner of the uplands, opposed a State as owner of the sovereign bed. The parties disputed whether the movement of the Missouri River

should be characterized as accretion, and both parties presented at trial substantial legal arguments and factual evidence to support their positions. In the present action, the United States, the owner of the uplands, again opposed a State as owner of a sovereign bed. The parties here have disputed whether the movement of Mono Lake's shoreline should be characterized as reliction, and both parties presented at trial substantial legal arguments and factual evidence to support their positions. In Wilson, without mentioning the Submerged Lands Act, this Court held that federal law must borrow state law to determine whether the river movement constituted an avulsion or accretion. In this action, however, the Ninth Circuit held that the Submerged Lands Act mandated that federal law must create federal common rules of decision to resolve these kinds of disputes whenever a State's claim is based on its sovereign bed ownership. This Court

must decide whether the Ninth Circuit's absolute and inflexible choice of federal common law presents a conflict with Wilson worthy of the Court's review.

To reconcile this apparent conflict, the Ninth Circuit relied solely on its belief that Wilson involved riparian claims of the state of Iowa. This was a gross misreading of the facts in Wilson, and in their responses neither the United States nor the intervenors even mention, much less defend, the Ninth Circuit's attempt to distinguish Wilson. Instead--having already abandoned the district court's puzzling distinction between the two cases, see California Petition for Certiorari ("Cal. Pet.") at 6,n.2--the United States for the first time in this litigation

advances a new distinction.[1] According t

the United States:

> "By contrast, as this Court recognized in State Lands Commission (457 U.S. at 278 n.7), Wilson was 'a case not involving a boundary dispute.' The issue before the Court in Wilson was not the choice of federal or state law to determine ownership of accreted or relicted lands, but rather, in the Court's own statement of the issue, 'whether federal or state law determines whether the critical changes in the course of the Missouri River in this case were accretive or avulsive.'" Brief for the Federal Respondents in Opposition ("Fed. Br.") at 9.

The United States badly misconstrue

what this Court meant in California v

United States, 457 U.S. 273 (1982), when i

stated that Wilson did not involve "

boundary dispute." Because the Unite

States' analysis of Wilson depends on thi

out-of-context quotation, we quote th

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1. The fact that the district court the Ninth Circuit and the respondents hav disagreed among themselves about how Wilso can be distinguished alone suggests th need for this Court's review.

entire passage from Wilson to which this Court referred:

> "The Court of Appeals, noting the existence of a body of federal law necessarily developed by this Court in the course of adjudicating boundary disputes between States having their common border on a navigable stream, purported to find in those doctrines the legal standards to apply in deciding whether the changes in the course of the Missouri River involved in this case had been avulsive or accretive in nature.
>
> "The federal law applied in boundary cases, however, does not necessarily furnish the appropriate rules to govern this case." Wilson, 442 U.S. at 672 (emphasis added).

When this Court in California v. United States stated that Wilson was "not a boundary dispute," it meant that Wilson was not an interstate boundary dispute for which federal common law necessarily must be created. Like Wilson, the present action is not an interstate boundary dispute, and like Wilson, this is not a case for which federal common law must be created.

The United States' further attempt to distinguish Wilson is equally misguided. The United States characterizes Wilson as a case involving the "definitional" distinction between accretion and avulsion, and then conclusorily asserts that this case simply involves the "ownership of accreted or relicted lands." See Fed. Br. at 9. The present case, however, equally involves the "definitional" characterization of the shoreline changes at Mono Lake. See Cal. Pet. at 15-16. The whole reason for the trial below was to determine whether the uncovering constituted a reliction. That is why the district court appointed an independent expert to develop hydrological information, and why the parties entered a stipulation of historical facts, briefed at length (over 200 pages) the legal implications of the shoreline changes, produced their own witnesses and evidence about the shoreline changes, and after a week-long bench trial,

argued whether the recession of Mono Lake constituted a reliction. Thus, the United States' conclusory statement that this case simply involved the ownership of "relicted lands"--as if that legal characterization was undisputed--flatly ignores the reason for the lengthy and costly proceedings in the trial court. The present case in every sense involved the "definitional" aspects of shoreline changes in the way that Wilson did.

The respondents also urge two theories to counter California's argument that the Submerged Lands Act provides no basis for federal common law because the Act merely confirmed preexisting state ownership of inland navigable waters. First, the intervenors, quoting dictum in United States v. California, 332 U.S. 19, 30 (1947), suggest for the first time that the States had only "qualified" ownership of inland navigable waters under the equal footing doctrine and that the Act restored

full title to these lands to the States. Brief in Opposition of Respondents-Intervenors at 6 ("Int. Br."). This false assertion defies this Court's pronouncement just weeks ago reaffirming the States' undisputed ownership of inland navigable waters under the equal footing doctrine. Utah Division of State Lands v. United States, 55 U.S.L.W. 4750 (June 8, 1987).2/

Second, the United States cryptically argues that the "Court in Corvallis held that the equal footing doctrine did not convey an ambulatory title, whereas the Submerged Lands Act established exactly that in Section 5(a), with regard both to inland and coastal

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2. Even if Congress was concerned that United States v. California "clouded" the States' title to inland navigable waters, see Int.Br. at 6, the effect of the Submerged Lands Act as to inland waters was only to confirm what the States already owned. It is the Court's rulings (e.g., Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212), not Congress's excessive caution, that determines the extent of state ownership under the equal footing doctrine.

waters, where the water borders federal lands." Fed. Br. at 8. The United States cannot seriously suggest that, prior to the passage of the Act, the boundaries of inland navigable waters were fixed at their location on the date of a State's admission to the Union, and that it was only the Act that allowed the boundaries to move with changes in shoreline location. Where application of the accretion doctrine has been appropriate, the boundaries of inland waters have always been "ambulatory". County of St. Clair v. Lovingston, 90 U.S. (23 Wall) 46 (1874).

Finally, the respondents make no attempt to explain why Congress would have intended that the Submerged Lands Act direct the use of federal common law rules to resolve disputes along inland waters in situations where state law would have controlled prior to the passage of the Act. Given this Court's recent reiteration of its policy regarding pre-statehood

conveyances--that it will "not lightly infer a congressional intent to defeat a State's title to land under navigable waters," Utah Division of State Lands, 55 U.S.L.W. at 4751--it would be the height of irony if the Submerged Lands Act's promotion of State ownership served as the basis for defeating California's claim to land that California unquestionably owned when diversions commenced in 1940.

In short, the respondents make no serious attempt to defend the choice of law analysis of the Ninth Circuit. Instead, they attempt a new rationalization for the district court's choice of federal common law. These latest arguments once again fail to explain both how the Act "federalized" title disputes regarding inland waters that were controlled by state law prior to the Act, and how Wilson can be meaningfully distinguished from this case.

II

Rather than defend the Ninth Circuit's choice of law analysis, the respondents seek to dissuade this Court from granting this petition by emphasizing issues that were either unaddressed by the Ninth Circuit or peripheral to its decision. Although a full discussion of these issues must await a brief on the merits, a brief reply to some of them is warranted.

First, relying on the Act creating the Mono Basin National Forest Scenic Area, 98 Stat. 1619, the intervenors argue that the use of state law would impair federal interests at Mono Lake. Int. Br. at 2-5. The Ninth Circuit, however, never weighed the impact of a state rule on specific federal interests because it refused to apply the three-part balancing test in Wilson. App. A at A-5. In any event, the intervenors' reliance on the federal Scenic Area as the basis for using federal common law is highly improper, because the Scenic

Area--which was created four years after this litigation commenced--was "intended to be entirely neutral" on this litigation. 1984 Cong. Rec. H.R. 9431 (Sept. 12, 1984) (remarks of Act's author, Rep. Lehman).

Second, the respondents present a number of internally inconsistent arguments about the meaning of California law, simultaneously arguing that it is "without any foundation in the common law of accretion," Int. Br. at 20, "consistent" with the federal rule of perceptibility, Fed. Br. at 17 n.15, "uncertain," Int. Br. at 20, and "aberrational," id. Naturally, California disagrees with much of this discussion and believes that the application of California law in these factual circumstances is historically established and accepted by the United States. Cal. Pet. at 3-4, 17-18. More to the point, California law is not the issue here. The Ninth Circuit, by requiring the automatic use of federal rules, never

addressed the meaning of California law and whether it was "hostile" to federal interests. Unless the Ninth Circuit's approach is corrected by this Court, federal courts throughout the country will be "mandated" to create separate federal rules regardless of the reasonableness of local state rules. Given this, the respondents' erroneous arguments about the meaning and applicability of California law are irrelevant at this time and cannot be considered until the propriety of applying California law has been reviewed in light of the Wilson criteria.3/

Third, the respondents argue that application of the common law "drainage"

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3. Even if the meaning of California law were disputed and uncertain, that is simply an incident of most litigation. Under Wilson, the United States must bear the risks faced by a private party litigating the same issue. Wilson, 442 U.S. at 673. Moreover, the possibility that the United States may prevail under California law further negates any argument that California is inherently hostile to federal interests.

rule advocated by California is contrary to the so-called majority rule that accretion or reliction, regardless of cause, belongs to the upland owner. Fed. Br. at 11-12. The drainage rule, however, is not a rule of "artificial reliction;" it is a rule that says that an intentional uncovering is different in kind (i.e., a physically different process) than a reliction. See Cal. Pet. at 20-21. Because an intentional uncovering is not "reliction," any rule that reliction regardless of cause belongs to upland owners never comes into play. For this reason, the same courts that apply the drainage rule comfortably apply the rule that accretion regardless of cause belongs to the upland owner. E.g., compare Martin v. Busch (Fla. 1927) 112 So. 274 (drainage rule) with Board of Trustees v. Medeira Beach Nominee, Inc. (Fla.App. 1973) 272 So.2d 209, 212 (following "majority" rule). California's arguments are entirely

compatible with traditional common law rules.

Fourth, the respondents contend that California's arguments about the common law reliction doctrine are erroneous and deviant, because, they argue, "[s]ince Roman times, the law of alluvion has been applied to the same problem presented by this case," Int. Br. at 12; see Fed. Br. at 11-12. The rule of alluvion, however, was not extended to lakes under Roman law, Digest of Justinian, Book 41, §§ 1 and 2, p. 56 (translated by Zulveta), nor under civil law, the Code Napoleon, § 558, p. 154 (1824 translation); Walton, The Civil Law in Spain and Spanish America, § 367, p. 195; Zeller v. Southern Yacht Club (1882) 34 La.Ann. 837; see Ker & Co. v. Couden (1912) 223 U.S. 268, 276. Moreover, English common law never applied the doctrine of alluvion to lakes because non-tidal waters were not owned by the Crown, see Bristow v. Cormican, 3 App. Cases 641,

and there are other reasons to question whether English common law treated the recession of water in the same manner as alluvion, see Callis, Upon the Statute of Sewers (1624), at 47; Woolrych's Law of Waters (1853) at 29. Thus, despite the respondents' repeated assertions, there is no inherent reason why the rule of alluvion must necessarily apply when lakes are uncovered; certainly there is no basis for assuming that the rule of alluvion historically applied to rivers automatically applies in all its particulars to boundary changes along navigable lakes. Whether the law of alluvion should be the appropriate federal rule here (assuming state law does not apply) would require consideration of numerous historical, physical and policy factors completely ignored by the Ninth Circuit in its simplistic assumption that the common law reliction doctrine was necessarily applicable.

Fifth, the respondents repeatedly dispute the merits of California's argument that there are no settled federal common law standards for determining whether the uncovering of a navigable lake constitutes a "reliction."[4/] They argue, for example, that California's proposed test for what is gradual and imperceptible is "baseless, and plainly warrants no further review." Fed. Br. at 15. The respondents' confidence is based on their assumption that the test (usually in dicta) for determining whether a shift in a river is accretive is necessarily the same test for determining whether the change in the shoreline of a lake is a reliction. Yet the respondents do not deny that some common law courts, as well as the Special Master in Utah v. United States, 420 U.S. 304 (1971), refused

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4. The respondents' detailed technical arguments regarding the meaning and application of the accretion doctrine, e.g., Int. Br. at 21-26, demonstrate how unsettled common law is when applied to the facts of this case.

to apply the respondents' version of the gradual and imperceptible test to a navigable lake. Nor do they cite any authority (other than dicta) that actually developed standards for characterizing whether lake shoreline movement constitutes reliction. See Cal. Pet. at 20-21.

Other federal officials do not share the respondents' confidence. In a Bureau of Land Management memorandum cited in Utah Division of State Lands, 55 U.S.L.W. at 4753 n.*, the BLM frankly admitted that the "test was applied to a river in [County of St. Clair v. Lovingston] and has generally been applied to rivers. It should be readily apparent that the test would lose its utility when applied to a lake of any magnitude whatsoever." 4 Record, Doc. J., p. 33-34, Utah Division of State Lands, 55 U.S.L.W. 4750 (emphasis added). The BLM memorandum proceeded to acknowledge legal authority (supporting California's view) that "large variations in lake level over a

relatively short period of time did not meet the gradual and imperceptible test." Id. (emphasis added); see also Cal. Pet. at 3-4, 17, 21 (citing refusal of various federal officials to apply reliction doctrine to uncovered lake beds). In light of the federal government's historic refusal to mechanically apply the reliction doctrine to uncovered lake beds, its current representation that the law in this area is "settled" is disingenuous. There are no settled federal standards for determining whether the uncovering of a navigable lake constitutes a reliction--particularly where the lake involved is a saline, terminal lake in the western United States that has been uncovered by an intentional diversion of its waters.5/

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5. Some members of this Court also do not appear to share the United States' confidence that the reliction doctrine necessarily applies when lake bed is uncovered. See Utah Division of State Lands, 55 U.S.L.W. at 4756 (arguing that Congress intended to reserve Utah Lake because if the lake bed was intentionally

CONCLUSION

A writ of certiorari should be granted to review the decision of the Ninth Circuit.

DATED: July 9, 1987

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exposed for use as a reservoir, "State land would be exposed which the State presumably could develop or convey as it saw fit") (White, J., dissenting) (emphasis added). The majority expressed no opinion on this issue.

No. 86-1729

(4)

In the Supreme Court

OF THE

United States

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STATE OF CALIFORNIA, ex rel. STATE LANDS COMMISSION
Petitioner,

VS.

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Respondents.

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BRIEF FOR AMICI CURIAE STATES OF ALASKA, ARIZONA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, MICHIGAN, MINNESOTA, MONTANA, NEBRASKA, NEVADA, NORTH DAKOTA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, WASHINGTON AND UTAH IN SUPPORT OF CALIFORNIA'S PETITION FOR A WRIT OF CERTIORARI

INTERESTS OF AMICI CURIAE

Throughout the history of this country, the Court has acknowledged and reaffirmed the important interests of the States in the ownership and control of their sovereign lands and in the creation and administration of state law, especially real property law. E.g., *Utah Division of State Lands* v. *United States*, U.S.L.W. 4750 (June 8, 1987); Pollard's Lessee v. *Hagan*, 44 U.S. (3 How.) 212 (1845); *Barney* v. *Keokuk*, 94 U.S. 324 (1877). The Court has further recognized that fair and evenhanded state law should govern the ownership interests of the federal government that are adjacent to inland navigable waters. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979). In addition, the Court has estab-

lished a general policy against the creation of federal common law. E.g., *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966); *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). The decision below offends all of these principles.

The Ninth Circuit would require that federal common law determine federal-state boundary disputes whenever the state claim arises from ownership of sovereign lands. The lower court incorrectly takes the Submerged Lands Act as a "mandate" to create federal rules of decision. But, paradoxically, the Act expressly supports the States' ownership, possession and control of sovereign lands. The lower court also erroneously declared that federal common law rules must automatically govern simply because a State *could* enact rules that injure federal interests, even though there is no evidence that States actually have done so.

The long-term implications of the decision below, if left uncorrected, cannot be understated. Federal lands abut inland navigable waters in various States. The determination of whether a lake bed has been uncovered by the process of reliction has always been governed by the property laws of each State, based on each State's geography and its particular needs and policies in maintaining an orderly system of property rights.

Under the decision below, federal common law would control federal claims to "relicted" sovereign lands. The *amici* States do not believe reliction should be governed by federal law at all,[1] and

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[1]As the decision below asserts, the United States' claim in this case depends on the Submerged Lands Act's reference to "accretion." Pet. App. A-5, A-6, citing 43 U.S.C. section 1313(a). But this case involves reliction, which is not mentioned in section 1313(a), and which is different from accretion. There is no statutory basis for making reliction a matter of federal law. The lower court also relied on *California State Lands Comm'n* v. *United States*, 457 U.S. 273 (1982). But that case involved accretions to *oceanfront* land, which, because it has a "special nature" as the national coastal boundary, necessarily involves federal law. *Id.* at 280, 283, citing *Hughes* v. *Washington*, 389 U.S. 290 (1967). No statutory nor precedential nor practical reason exists to apply federal law to the instant case.

certainly not by federal common law. But *assuming* federal law should apply at all, state law should be incorporated as the relevant federal law. The reasons are compelling.

When waters recede on state sovereign lands, all abutting property owners are affected, and lawsuits frequently result. Such disputes may be between private and federal littoral owners *inter se* and also between those parties and the State as the holder of sovereign title. Disputes are minimized so long as applicable law remains settled and predictable, and so long as neighboring landowners enjoy equal treatment under a uniform application of the law. The decision below would upset the prevailing equanimity by applying different law to one landowner, the Government.

The Ninth Circuit's creation of a uniform national property law for federal claims would inevitably confuse established property law wherever the Government owns land abutting navigable waters. The confusion would give rise to disputes that would affect private, state and federal title in many States. And besides the inevitable title disputes, State and local land planners and administrators would be burdened with difficult new questions of how to discern applicable federal common law and when and where to apply it.

The decision below has the potential of disrupting a great many property rights throughout the Nation, and it is imprudent and unnecessary. The least disruptive choice of law is the law of the State in which the property exists. It is far more reasonable that one party (the Government) follow evenhanded state reliction laws than to require each State to change its laws and procedures to accommodate that one property holder. And nothing in this Court's decisions is to the contrary. Unlike the *Hughes* situation of oceanfront property that forms the national boundary, inland sovereign lands are not " 'sufficiently different . . . so as to justify a 'federal common law' rule of riparian proprietorship.' " *California State Lands Comm'n, supra,* 457 U.S. at 282, quoting *Oregon State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 377 n.6 (1977).

In the instant case, as "[i]n *Wilson,* where [the Court] did adopt state law as the federal rule, no special federal concerns, let

alone a statutory directive, require[s] a federal common-law rule." *California State Lands Comm'n, supra,* 457 U.S. at 284.

The decision below should be reviewed also for other reasons. If, as the Ninth Circuit suggests, federal interests require protection from the application of state law whenever the State is in a position to establish rules that favor state interests — even though the State has not in fact done so —then federal common law will always control because there is always the possibility that state law will "favor" state interests. But this has never been the test. In the absence of "concrete evidence" that state law adversely affects federal interests, state law should ordinarily be borrowed as the rule of decision. *Wilson,* 442 U.S. at 673 (1979); *United States* v. *Kimbell Foods, Inc.,* 440 U.S. 715, 730 (1979). California law in any event is consistent with common law authority, and the possibility that the federal government may not prevail under California law is not itself a sufficient reason to create special federal rules on its behalf. *Wilson,* 442 U.S. at 673.

The amici States request that the Court grant the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision disturbs vital principles affecting state sovereignty, state-federal relations, and important property rights.

The decision below violates *California State Land Comm'n* v. *United States,* 457 U.S. 273 (1982), *Wilson* v. *Omaha Indian Tribe,* 442 U.S. 653, 671-72 (1979), and *Oregon State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977), by holding that federal common law governs property rights in sovereign lands uncovered when the water recedes. Those decisions, along with the Submerged Lands Act, require that the decision below be reviewed and corrected.

The lower court decided this case by faulty inference and analogy. *California, supra,* had concluded that "a dispute over *accretions* to *oceanfront* land where title rests with or was derived from the Federal Government is to be determined by federal

law." 457 U.S. at 283 (emphasis added). But the instant case involves neither accretions nor oceanfront lands.

The decision below departs from this Court's clear pronouncements: Oceanfront lands are "sufficiently different from the usual situation so as to justify a federal common law rule of riparian proprietorship: . . . This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the supreme Law of the Land." *Corvallis,* 429 U.S. at 377 n.6 (internal quotation marks omitted), favorably quoted in part in *California, supra,* 457 U.S. at 282.

Indeed, "[a]lthough federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law." *Id.,* 429 U.S. at 370-71.

The Submerged Lands Act assures and secures state title in sovereign lands, and section 5(a) expressly excludes *accretions* to federal lands from the Act's operation. But section 5(a) says nothing of reliction; it does not define reliction, nor make reliction a matter of federal law, nor refer to reliction in any way. Furthermore, the legislative history of the Act makes clear that section 5(a) in any circumstances was not intended to direct the use of federal common law in situations where it would not have governed prior to the passage of the Act. The Act does not purport to be relevant to this case, affords no basis for creating federal common law, and does not support the decision below.

Federal common law has no place in this case, and if federal law should apply at all, then only in the form of state property law incorporated as the federal rule of decision. *Wilson, supra,* 442 U.S. at 671-73. There is "no need for a uniform national rule to determine whether changes in [a water body] affecting riparian land owned or possessed by the United States . . . have been avulsive or accretive." *Id.* at 673. Federal interests, therefore, should "be treated under the same rules of property that apply to

private persons holding property in the same area by virtue of state, rather than federal, law." *Id.*

At risk under the lower court's decision are important interests significant to the States. One of the most prominent and important elements of state sovereignty is ownership of beds of navigable waters, which are held in trust for the public. Apparently, under the Ninth Circuit's expansive view of the reliction doctrine, the States would automatically lose ownership of uncovered sovereign lands. Another extremely important state concern — for legal and practical reasons — is the impact on the States' administration of an orderly system of real property law. Under the decision below, dual sovereigns will administer these sovereign lands; and the local topographic and political necessities underlying state property law are disregarded in favor of a procrustean uniformity. All of that will create confusion and, inevitably, disputes and litigation amongst private, state and federal owners.

The lower court has misused section 5(a) of the Submerged Lands Act to fashion a choice of law that favors federal interests without regard for vital state interests. In so doing, the lower court violated the purpose of the Act and failed to observe the required analysis for choice of law.

Simply, the lower court's decision has no basis in statutory law, it offends this Court's precedents, disregards principles of property law and violates the general rule against creating federal common law. It should be reviewed and reversed.

ARGUMENT

I

THE NINTH CIRCUIT'S DECISION INTERFERES WITH THE STATES' OWNERSHIP OF SOVEREIGN LAND AND THEIR ADMINISTRATION OF LOCAL REAL PROPERTY LAW.

The Ninth Circuit's adoption of federal common law rules to govern virtually all federal-state property disputes has adverse consequences in two important areas of state interest — state ownership and control of sovereign lands and state administration

of a uniform, evenhanded system of state real property law. Both of these interests are deeply ingrained in the history of this country.

A. The Interests of the States in the Ownership of Sovereign Lands and in the Administration of State Real Property Law are Well-Established.

1. State ownership of sovereign lands.

One of the most important elements of the States' sovereignty is their title to the beds of navigable waterways, which are held in trust for the benefit of their people. State ownership of these "sovereign" lands derives from principles of the common law of England whereby the Crown held such lands, in trust, by virtue of its sovereign prerogative. *Shively* v. *Bowlby,* 152 U.S. 1, 11-13 (1894); *Illinois Central Railroad* v. *Illinois,* 146 U.S. 387, 435-437 (1892). When the Revolution took place, the original States succeeded to such title as independent sovereigns, and that title was not granted or otherwise delegated by them to the new national government. *Martin* v. *Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842); *Pollard's Lessee* v. *Hagan,* 44 U.S. (3 How.) 212, 228-230 (1845). Later-admitted States succeeded to this same title, not by virtue of any congressional grant, but by virtue of their status as sovereigns equal in stature to the original States under the constitutionally-based Equal Footing Doctrine. *Pollard's Lessee,* 44 U.S. at 223, 228-230; *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 370, 373-374 (1977).

This title in the States is an inherent attribute of their sovereignty. *United States* v. *Mission Rock Co.,* 189 U.S. 391, 404 (1903); *Hardin* v. *Jordan,* 140 U.S. 371, 381 (1891). "The dominion over navigable waters, and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged. . . ." *Massachusetts* v. *New York,* 271 U.S. 65, 89 (1926). Accordingly, this Court has ruled that a State's title to such land vests absolutely upon statehood and is

not subject to later defeasance by operation of federal law. *Corvallis,* 429 U.S. at 370-371, 374, 386.

2. State administration of real property law.

The States' interest in administering and applying its real property law is another important element of their sovereignty. In a line of cases extending from *Pollard's Lessee* through *Wilson*, this Court has held that determinations concerning land title are matters for the application of state law. See, e.g., *Barney,* 94 U.S. at 337; *Packer* v. *Bird,* 137 U.S. 661, 669-670 (1891); *St. Louis* v. *Rutz,* 138 U.S. 226, 242 (1891); *Shively*, 152 U.S. at 57-58. "The nature and extent of the rights of the state and of riparian owners in navigable waters within the state and the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state." *Fox River Paper Co.* v. *Railroad Commission*, 274 U.S. 651, 655 (1927).

This interest is particularly acute as it relates to state administration of sovereign lands. The Court long ago held that ". . . it depends on the law of each State as to what waters and what extent this prerogative of the State over the lands under water shall be exercised." *Hardin*, 140 U.S. at 382. Consequently, state law has long controlled questions regarding the characterization of physical changes to its sovereign lands. When a physical change occurs solely within the boundary of a single State, this Court has applied the following general rule:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them." *Arkansas* v. *Tennessee*, 246 U.S. 158, 175-76 (1918); see *Rutz*, 138 U.S. at 242.

B. The Ninth Circuit's Decision has Serious Adverse Consequences for these Interests.

Based on its reading of the Submerged Lands Act, the Ninth Circuit devised a rule which requires that federal courts develop federal common law rules to control federal-state property disputes whenever the States' ownership is based on sovereign ownership of navigable waters and their beds. It further announced that a federal common law rule of decision must be adopted merely because the States conceivably could adopt rules that benefit themselves at the expense of federal upland interests. The Ninth Circuit's opinion has serious adverse consequences for the States.

1. Impacts on sovereign land title.

First, the Ninth Circuit decision results in the direct and immediate loss of state sovereign lands because the federal common law created by the Ninth Circuit systematically favors upland interests to the detriment of the owner of the bed. Under the Ninth Circuit's version of federal common law, all physical changes to lakes will be characterized as "relictions" regardless of the factual circumstances, and all such "relictions" will redound to the federal government as upland owner. This automatic rule of reliction has no support under general common law principles. (See California Petition for a Writ of Certiorari ("Cal. Petition") at 20-22.

The States' interest in retaining their sovereign lands is more than a proprietary one. Sovereign lands are

> ". . . different in character from that which the State hold in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . ." *Illinois Central Railroad*, 146 U.S. at 452.

The subject of the present litigation demonstrates the important difference between sovereign lands and other publicly-owned

lands. In *National Audubon Society* v. *Superior Court,* 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709, *cert. denied,* 464 U.S. 977 (1983), the California Supreme Court held that the future of the bed and waters of Mono Lake must be guided by the public trust principles announced in *Illinois Central Railroad.* By declaring that the uncovered bed adjoining federal upland ownership belongs to the United States, however, the Ninth Circuit terminated the public trust character of most of the uncovered bed of Mono Lake. This portion of uncovered bed is therefore no longer subject to the inherent limitations on use and alienation imposed by the public trust doctrine. *Illinois Central Railroad,* 146 U.S. 387. Instead, the federally-owned portion of uncovered bed is now generic federal public land, subject to the caprice of a particular federal administration.

2. Impact on state administration of real property law.

Second, the Ninth Circuit's requirement that these disputes be governed by federal common law rules also has grave consequences for the States' interest in developing and administering local real property and land title law. The Ninth Circuit's insistence that federal common law rules automatically govern federal-state disputes involving state sovereign lands offends the States' legitimate interest in their status as autonomous sovereign entities and results in unnecessary federal intrusion into areas of state concern. This invasion of state sovereign interests has real-life consequences.

Under the Ninth Circuit's approach, in a single dispute involving newly-created land along inland navigable waterways, federal upland interests competing against state sovereign interests will be governed by federal common law rules; federal upland interests competing against private and state upland interests will be governed by federal law borrowing state law; and, under *Corvallis,* private upland interests competing against state sovereign interests will be governed by state law. This confusing and arbitrary scheme imposes different rules and potentially different outcomes, even though the identical physical process (the uncovering of sovereign land) is involved in all three disputes. That would subvert the States' interest in a fair and orderly system of real

property law. *Wilson*, 442 U.S. at 673. Furthermore, it contradicts the lesson in *Wilson* that "we see little reason why federal interests should not be treated under the same rules of property that apply to persons holding property in the area of virtue of state, rather than federal, law." *Id.*

The practical dysfunction of the lower court's approach is further illuminated by the record in this case. Under the Ninth Circuit's opinion, the federal upland ownership surrounding Mono Lake will belong to the United States under a federal common law of reliction; the remaining portion of the uncovered bed which is adjacent to the private and non-federal public upland parcels that are scattered among the federal parcels will belong to California under California law. The result is a mosaic of federal and state-owned parcels mixed throughout the uncovered lake bed, without clearly delineated lateral boundaries between state and federal ownership. Rather than the orderly administration of the uncovered bed by one sovereign (California), the Ninth Circuit's opinion requires dual administration by two sovereigns, often with uncertainty as to the boundaries between state and federal lands.

The Ninth Circuit's decision has other practical impacts on the administration of local property law. Purchasers and sellers of real property make rational judgments concerning the nature and extent of land title conveyed and delivered based on their assumptions about state property rules. The introduction of federal common law rules may jeopardize these relationships formed in reliance on state law. The record in this case is again instructive. California has issued over 400 patents to over 136,000 acres of land throughout the state in reliance on its ownership of drained lake beds under California law. CR 91 at 46-47, ¶ 106. Wherever the federal government is an upland owner, application of a federal rule of "reliction" now clouds the title of the private purchasers of former lake bed parcels throughout the state who reasonably acted in reliance on state law.

The Ninth Circuit's application of a nationwide uniform federal rule also frustrates the ability of the States to operate an integrated, consistent local scheme of land title based on the pertinent geographical, geological, legal, or political considerations applica-

ble in each state. The Ninth Circuit's extrapolation of the common law reliction doctrine to the facts of this case illustrates the problem. Based on the extremely limited federal decisional law addressing additions to navigable lakes, see *Banks* v. *Ogden*, 69 U.S. 57 (1865), the Ninth Circuit concluded without analysis that all such additions must be characterized as "reliction." In fact, there is no one answer to the questions concerning the characterization and ownership of uncovered lake beds. State courts have addressed lake uncoverings in a variety of ways, taking into account the size and rate of the uncovering, whether the bed was intentionally drained, reclaimed or uncovered, and whether policy considerations supporting the reliction doctrine were present. See Cal. Petition at 20-22. Natural physical conditions themselves significantly vary from region to region: a truly natural, gradual and imperceptible recession of a navigable lake might lead a court in the midwest to characterize the newly-exposed land as "reliction"; courts in the western United States, addressing ownership issues associated with continually fluctuating lakes with no outlet — lakes that have no factual counterpart in the history of common law — would be justified in finding no reliction or change in ownership even where a substantial area of land was exposed. See *Utah* v. *Hardy Salt Co.*, 486 P.2d 391 (Utah 1971).

This Court has implicitly recognized the need for flexibility in creating ownership rules. The Court adopted the Special Master's Report in *Utah* v. *United States*, 420 U.S. 304 (1975), 427 U.S. 461 (1976), in which the Special Master did not apply the reliction doctrine and did not follow the concept of ordinary highwater mark in the Great Salt Lake case. California and the rest of the states should be free to develop rules to address the conditions peculiar to their jurisdictions and to apply these rules to the federal government as long as they do so in a fair and evenhanded manner.

A consideration of these impacts on state interests is an important factor in the choice of law equation, see *Wilson*, 442 U.S. at 674-75, but the Ninth Circuit did not even suggest that it had taken state interests into account in its choice of law analysis. Moreover, the Submerged Lands Act, on which the Ninth Circuit

based its decision to apply federal common law, demonstrates no intent to disregard or minimize State interests.

II

THE NINTH CIRCUIT'S CHOICE OF LAW CONFLICTS WITH THE PURPOSE OF THE SUBMERGED LANDS ACT TO PROMOTE STATE OWNERSHIP AND CONTROL OF SOVEREIGN LANDS.

Since the federal *upland* property involved in this case was included in section 5(a) of the Submerged Lands Act, 43 U.S.C. section 1313(a), the Ninth Circuit concluded that the Act requires the use of federal rules of decision to govern ownership of the exposed bed. In an attempt to reconcile its incorporation of federal common law with the holding in *Wilson*, the Ninth Circuit determined that section 5(a) requires federal common law rules only in cases where the States' claim is based on its ownership of sovereign lands, but not where the States' claim is based on riparian ownership. This analysis disregards the purposes and intent of the Submerged Lands Act.

A. The Purpose of the Submerged Lands Act.

The Submerged Lands Act may be the most affirmative promotion of state interests that Congress has enacted in the past 35 years.

It is well known that the Submerged Lands Act was enacted by Congress as a response to a series of cases in which the Court determined that the federal government had "paramount rights" to the lands and resources within the three-mile limit extending from the coastal shoreline.[2] Congress believed that these submerged coastal lands belonged to the States just as tidewaters and navigable inland waters do. E.g., S. Rep. 1592, 80th Cong., 2d Sess. 5, 17, 18, 26 (1948); S. Rep. No. 133, 83d Cong., 1st Sess. 7, 24 (1953). The Act thus restored to the States the possession

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[2]See *United States* v. *California*, 332 U.S. 19 (1947); *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950).

and control of these submerged coastal lands. E.g., S. Rep. No. 133 at 24; 99 Cong. Rec. 2830 (1953). The Court has agreed that the Act was designed to undo the effect of its 1947 decisions. See *United States* v. *California,* 436 U.S. 32, 37 (1978); *United States* v. *Louisiana,* 363 U.S. 1, 35-36 (1960).

In order to underscore the States' control of navigable waters, the Act went beyond the problem that generated the legislation and also confirmed the States' ownership of tidelands and land underlying inland navigable waters. 43 U.S.C. sections 1301, 1311. Both the supporters and the opponents of the Act agreed that the confirmation of these lands reaffirmed the States' historic ownership of these lands under the Equal Footing Doctrine. E.g., H.R. Rep. No. 1778, 80th Cong., 2d Sess. (1948), reprinted in 1953 U.S. Code Cong. & Ad. News 1425; S. Rep. No. 133, 83d Cong., 1st Sess. (1953), reprinted in 1953 U.S. Code Cong. & Admin. News 1480; Minority views to accompany H.R. 5992, reprinted in 1953 U.S. Code Cong. & Ad. News 1439; Minority views to S.J. 13, reprinted in 1953 U.S. Code Cong. & Ad. News 1543, 1553. This ringing confirmation encompassed not just state ownership of sovereign lands, but administration and control of the lands under applicable state laws. E.g., H.R. Rep. No. 215, 83d Cong., 1st Sess. (1953), reprinted in 1953 U.S. Code Cong. & Admin. News at 1388-89.

B. Section 5(a) was Designed to Maintain the Status Quo with Respect to Federal Property, and Does Not Require the Use of Federal Rules to Resolve Property Disputes Where State Law Would Have Controlled Prior to the Act.

Given this resounding declaration of the States' ownership and control of their sovereign lands, it would be anomalous if Congress at the same time intended that section 5(a) would have the effect of requiring the development of federal common law principles in situations where state law would have controlled prior to the passage of the Act, at least where inland navigable waters are involved. It is not surprising that there is no legislative history suggesting that Congress intended section 5(a) to have that effect. To the contrary, the legislative history regarding the meaning of 5(a) is unequivocal that its purpose was to leave the

United States in the position it occupied at the time of the passage of the Act. Thus, this colloquy regarding section 5(a):

> *Sen. Holland.* " . . . I should like to inquire if it was the purpose of this particular exception to leave the Federal Government exactly in the position it now occupies, with such rights as it may have, and with such obligations or responsibilities as it may have, with reference to any lands which it presently and actually occupies by reason of building and maintaining on such lands, installation and the like, under claim of right. There was no purpose to improve the rights of the United States, or to take from those rights in any particular, by this provisions?"
>
> *Sen. Cordon.* "The Senator is exactly correct."
>
> *Sen. Holland* " . . . I now wish to return to the earlier provision or exception, which relates to "All lands expressly retained by or ceded to the United States when the State entered the Union. . . ."
>
> *Sen. Cordon.* " . . . The provision specifically saves to the United States that type of facility concerning which there never has been, in the history of this country, a question as to the Federal Government's rights of ownership.
>
> "The sole purpose of the legislation proposed is to recreate the situation in law as it existed in fact before the California, Louisiana, and Texas decisions and not to go beyond that point."

99 Cong. Rec. 2619 (1953).

Senator Cordon later reemphasized the point:

> "The purpose of the language [in section 5(a)] is to retain in the Government, such rights as the Government, under its claim of right in the lands, is actually occupying, *thus putting the Government, after the enactment of the pending measure, in the position it would have occupied had none of these matters ever arisen, and if it had to stand on whatever law supported its claim.*" *Id.* at 2631 (emphasis added); see *United States* v. *California,* 436 U.S. at 38, 39 (citing to

> legislative history that section 5(a) "'neither validates the claim nor prejudices it,' but merely 'leaves it where we found it' for eventual adjudication").

Section 5(a) does not direct the adoption of federal common law rules at all. The Act's purpose is to ensure State title, and section 5(a) neither enhances federal claims to "relicted" lands nor detracts from State title in those lands. Simply, section 5(a) does not apply in this case and does not support the adoption of federal common law rules adverse to state property law. Even if that section did apply, it would support a federal common law reliction rule only if federal common law would have governed prior to passage of the Act.

This interpretation of section 5(a) is wholly consistent with the general purpose of the Act, which was to restore state sovereign ownership as it was believed to exist prior to *United States* v. *California*, 332 U.S. 19 (1947), and incidentally to confirm state sovereign ownership in inland areas that had not been affected by the Act. See text *supra* at 14-15; 99 Cong. Rec. 2618-19, 2680 (1953). With respect to inland waters, the Ninth Circuit's conclusion would put the States in a worse position than they were in before the Act, a result plainly contrary to the intent of Congress.

The language of section 5(a) also contradicts the idea that section 5(a) directs the adoption of federal common law. Section 5(a) is extremely broad and involves far more than just a retention of accretions to federal lands. It includes:

> (1) all land title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States;
>
> (2) all lands which the United States lawfully holds under the law of the State;
>
> (3) all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea);

> (4) all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity;
>
> (5) all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and
>
> (6) any rights the United States has in lands presently and actually occupied by the United States under a claim of right. 43 U.S.C. section 1313(a).

Section 5(a) is merely an inventory of federal property that is unaffected by the Act. It does not dictate the adoption of federal rules to decide disputes involving federal property. To the contrary, it expressly recognizes that some federal property is held under state law; surely Congress did not intend to direct the development of federal common law rules to resolve property disputes where the United States' claim is derived solely from state law. Again, the only reasonable interpretation of section 5(a) is that it was designed to maintain federal ownership (other than the "grant" of submerged coastal lands) *as it existed under the law prevailing at the time of the Act.* Federal common law principles should resolve property disputes only if they would have done so prior to the Act.

Finally, the Ninth Circuit's conclusion that section 5(a) directs adoption of federal common law in cases involving state sovereign claims, but not state or private upland claims, makes no sense as a matter of policy. Why would Congress declare that the federal interests in the use of a federal common law rule are greater when the United States opposes the state in a sovereign rather than a proprietary capacity? Although the federal interest in choice of law is no different in the two cases, the States' interest in the application of state law is significantly greater when their sovereign lands are involved. Contrary to the purposes of the Submerged Lands Act and the policy concerns in *Wilson*, which favor the borrowing of state law, the Ninth Circuit has ascribed to Congress an intent to discriminate between state sovereign and proprietary claims and to effectively penalize the States whenever their claims are based on sovereign title. Nothing in the Submerged Lands Act supports such a result.

To summarize, the Ninth Circuit's use of federal common law in this case conflicts with *Wilson* and the Submerged Lands Act because (1) California's claim depends on the Equal Footing Doctrine, not the Act, so the Act is immaterial here, Cal. Petition at 11-19; (2) section 5(a) of the Act does not purport to apply to "reliction" lands; (3) even if section 5(a) were relevant, it would provide for federal ownership of lands only to the extent federal law gave the Government title before passage of the Act, and it does not direct adoption of federal common law; and (4) the Ninth Circuit's attempt to reconcile *Wilson* on the ground that the Act directs adoption of federal common law where the States' claim is based on sovereign ownership directly contradicts the Act's undisputed purpose of securing State title in sovereign lands.

Under the Ninth Circuit's approach, States' ownership and control of their sovereign lands underlying inland navigable waters have been seriously diminished, rather than enhanced, by the Submerged Lands Act. It is safe to assume that not a single member of Congress in 1953 intended the construction of the Act put forth by the Ninth Circuit.

CONCLUSION

The amici States request that the Court grant the petition for a writ of certiorari.

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Respectfully submitted,

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